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Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1599

JEWELL D. CHANDLER,

Petitioner,

v.

RICHARD L. ROUDEBUSH.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

JACK GREENBERG
JAMES M. NABRIT, III
CHARLES STEPHEN RALSTON
BILL LANN LEE
MELVYN LEVENTHAL
ERIC SCHNAPPER
10 Columbus Circle
New York, New York 10019

Attorneys for Amicus Curiae

MEILEN PRESS INC. — N. Y. C. 219

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BRIEF OF THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

Interest of Amicus*

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid gratuitously to Negroes suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf.

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* Letters of consent to the filing of this Brief from counsel for the petitioner and the respondent have been filed with the Clerk of the Court.

The charter was approved by a New York Court, authorizing the organization to serve as a legal aid society. The NAACP Legal Defense and Educational Fund, Inc. (LDF), is independent of other organizations and is supported by contributions from the public. For many years its attorneys have represented parties in this Court and the lower courts, and it has participated as *amicus curiae* in this Court and other courts, in cases involving many facets of the law.

Attorneys for the Legal Defense Fund have handled many cases involving Title VII of the Civil Rights Act of 1964 and discrimination in employment generally.* Since the amendment of Title VII in 1972 to cover federal employees, LDF has become involved in cases raising a variety of procedural and substantive issues in actions brought under both Title VII and other statutes on behalf of federal employees.** In most of our cases the specific issue involved here—the right to a trial so-called *de novo*—is involved. Thus, LDF and its clients have an immediate interest in the resolution of this important issue.

Summary of Argument

I.

In amending Title VII of the Civil Rights Act of 1964 to extend its protections to employees of the federal government, Congress intended to give federal employees the

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* *E.g., Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *McDonnell Douglas* v. *Green*, 411 U.S. 792 (1973); *Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975); *Albemarle Paper Co.* v. *Moody*, —— U.S. ——, 45 L.Ed.2d 280 (1975).

** *E.g., Brown* v. *G.S.A.*, No. 74-768; *Place* v. *Weinberger*, No. 74-116; *Salone* v. *United States*, No. 74-1600.

same rights as those enjoyed by employees of private companies and state and local governments. A central principal in the statutory scheme embodied in Title VII is that there is a variety of overlapping and independent remedies available to eradicate discrimination in employment. The central role in enforcement has been given to the federal courts. Therefore, federal employees are entitled to the same plenary trial pursuant to the Federal Rules of Civil Procedure as are all other employees. Only in this way can federal employees be assured of an impartial tribunal and the resolution of discrimination claims based on the application of the law of Title VII to a complete record.

II.

The administrative procedure established by regulations of the Civil Service Commission, together with either a review of or an independent determination based on but limited to the record compiled administratively is no substitute for a plenary trial in federal court. The procedure suffers from the same deficiencies present in arbitration proceedings that were noted by this Court in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974). These include the absence of a fact finding apparatus comparable to that in federal court, the failure to follow Title VII law, and the ultimate fact finding and decision-making power being in the hands of an interested party. Thus, under the standards of *Alexander*, the record made in such a proceeding is entitled to no special deference, but may, of course, be introduced into evidence to be given whatever weight may be appropriate.

ARGUMENT

I.

Prior Decisions Of This Court Require That Federal Employees Be Afforded A Plenary Trial in Federal Court.

The issue presented by this case—whether a federal employee[1] who brings a civil action under Title VII of the Civil Rights Act of 1964[2] is entitled to the same plenary judicial trial, or "trial *de novo*", as it has been called, as are all other employees—encompasses two questions. *First,* may evidence relevant to whether there has been discrimination other than evidence developed during an administrative proceeding be discovered and introduced in court? *Second,* should a federal court make an independent determination, based on all the available evidence, whether there has been a violation of Title VII, or must it affirm an administrative determination of no discrimination if that determination is not irrational or arbitrary, or is supported by "substantial evidence?" Essentially three rules have been adopted by the lower courts.

The Tenth Circuit, in *Salone* v. *United States,* 511 F.2d 902 (1975), *pending on petition for certiorari,* No. 74-1600, has held that if any facts other than those in the administrative record are needed, the case is to be remanded to the agency. The role of the district court is the limited review of the Administrative Procedure Act. The Ninth Circuit in the present case, and recently the Eighth Circuit

[1] Throughout this Brief the word "employee" includes applicants for employment and former employees as well as persons actually employed by the federal government.

[2] As amended by the Equal Employment Opportunity Act of 1972, P.L. 92-261.

in *Haire* v. *Callaway,* —— F.2d ——, 11 F.E.P. Cases 769 (Nov. 17, 1975), have held with regard to the first question that the plaintiff must bear a substantial burden of demonstrating a "need" to supplement the administrative record; otherwise, no new evidence may be introduced. However, exactly how that burden is to be met is not clearly defined. With regard to the second question, the Eighth Circuit held that an independent determination as to a Title VII violation should be made, while the Ninth Circuit apparently follows the "substantial evidence" rule.

The three other circuits that have ruled on these issues have held that a federal employee is entitled to proceed under Title VII in the same way as any other employee under the rule of *Alexander* v. *Gardner Denver Co.,* 415 U.S. 36 (1974). *Sperling* v. *United States,* 515 F.2d 465 (3rd Cir. 1965), *petition for a writ of certiorari pending,* No. 75-247; *Caro* v. *Schultz,* —— F.2d ——, 10 E.P.D. ¶ 10,381 (7th Cir. 1975); *Hackley* v. *Roudebush,* 520 F.2d 108 (D.C. Cir. 1975). Thus, he need not meet the *Chandler* and *Haire* burden of demonstrating a need "before he can exercise procedures routinely accorded to civil litigants." *Hackley* v. *Roudebush,* 520 F.2d at 171. Just like an arbitrator's decision under *Alexander,* the record of the administrative process may be admitted "for whatever weight the trial judge wishes to accord it," and the court may exercise the normal power over discovery to avoid unnecessary duplication. 520 F.2d at 150-151.

The Department of Justice has, in the lower courts, argued, in essence, for the *Salone* rule; *i.e.,* no new evidence may be introduced in court, and there is a limited scope of review.[3] *Amicus* urges that the result reached by the

[3] In response to an inquiry at oral argument in the case of *Oringel* v. *Matthews,* 5th Cir. No. 74-3971, the Department of Justice has informed the court that its position is that "since [42 U.S.C. 2000e-16] does not define the scope of judicial review or

Third, Seventh and District of Columbia Circuits is clearly correct, and is compelled by the face of the statute (42 U.S.C. § 2000e-16), its legislative history, purpose, and the decisions of this Court in *Alexander* v. *Gardner Denver Co., supra; McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), and *Morton* v. *Mancari,* 417 U.S. 535 (1974).

Alexander v. *Gardner-Denver Co.,* and *McDonnell Douglas Corp.* v. *Green,* at 798-99, held explicitly that a plaintiff is entitled to a full plenary trial *de novo* in a civil action maintained under the provisions of 42 U.S.C. § 2000e-5 of Title VII of the Civil Rights Act. *Alexander,* discusses at length why the ultimate responsibility for the full enforcement of Title VII rests with the federal courts and why this responsibility necessarily entails a full plenary trial. When Congress enacted the Equal Employment Opportunity Act of 1972 and amended Title VII to provide federal employees with a cause of action under it for the first time, it intended, as noted in *Morton* v. *Mancari,* at 546-47, that the substantive law of Title VII be applied to federal employees. As an integral part of ensuring that goal, Congress provided, in 42 U.S.C. § 2000e-16(c) and (d), that federal employees can bring a "civil action as provided in section 2000e-5," which action would be governed by the "provisions of section 2000e-5(f) through (k)," precisely the provisions interpreted and applied by this Court in *Alexander.* Even prior to *Alexander,* of course, the lower federal courts had generally held that a full plenary trial *de novo* was required in such actions.[4] Thus, the face of the statute leads to the conclusion that

contain any requirement of a trial *de novo,* the scope of judicial review is that provided under the Administrative Procedure Act." 5 U.S.C. § 706(2). Justice Department Memorandum in Response to Court Request, p. 1. The Department has taken the same position in *Swain* v. *Callaway,* 5th Cir. No. 75-2002.

[4] See the cases cited in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. at 799.

a federal employee receives what has been termed a trial *de novo,* a full plenary hearing in the District Court. Indeed, the only words of the statute that could possibly lead to a different conclusion, the phrase "as applicable" in § 2000e-16(d), do no more than exclude the references in 2000e-5 to the Attorney General and the Equal Employment Opportunity Commission, since those references are not "applicable" to an action brought by a private party in which the federal government is itself the defendant.[5] *Hackley* v. *Roudebush,* 520 F.2d at 120-121.

Thus, as in the private sector, Congress intended that federal employees have access to a variety of independent and overlapping remedies to attack discrimination in employment. *Alexander* v. *Gardner-Denver Co.,* 415 U.S. at 48-49; *see also, Johnson* v. *Railway Express Agency,* 421 U.S. 454, 459 (1975). The error the Eighth, Ninth, Tenth Circuits, and the government make, is to view the proceeding in federal court as an adjunct to the administrative process, dependent on and limited to it. The use of the phrase "civil action"[6] in § 2000e-16(c), and the link to the

[5] The authoritative analysis of the 1972 Amendments as reported by the House-Senate Conference Committee, explicitly states that, "The provisions of [2000e-5(f)-(k)], concerning *private civil actions* by aggrieved persons are made applicable to . . . Federal employees." Section-by-section Analysis of H.R. 1746, the Equal Employment Opportunity Act of 1972, 118 Cong. Rec. at pp. 7169-7566 (92d Cong., 2d Sess. (1972). (Emphasis added).

[6] Had Congress intended to preclude trials *de novo,* and to limit the district courts to determining whether the agency decision was supported by substantial evidence, it would have said so explicitly. See e.g., 5 U.S.C. § 706(2)(E) ("substantial evidence" test); 15 U.S.C. § 45(c) (findings to be upheld "if supported by evidence"); 15 U.S.C. § 21(c) ("substantial evidence" test); 15 U.S.C. § 522 (facts found by agency "prima facie evidence" of those facts); 29 U.S.C. § 160(e) ("substantial evidence"); 49 U.S.C. § 16(2) (findings of commission "prima facie" evidence of facts stated therein); 21 U.S.C. § 371(f)(3) ("substantial evidence"); 21 U.S.C. § 348(g)(2) (findings to be sustained "if based upon a fair evaluation of the entire record"); 12 U.S.C. § 1848 ("substantial evidence").

provisions of 2000e-5 through 2000e-16(d), show the contrary. The fact that a federal employee must give the agency 180 days to act on his complaint as a pre-condition to his filing an action under Title VII is only an exhaustion requirement; as in any other case brought pursuant to 2000e-5, it is not a limitation on his rights once he is in federal court.[7] *McDonnell Douglas Corp.* v. *Green,* 411 U.S. at 798-99.

As explained exhaustively in *Hackley* v. *Roudebush, supra,* and by the petitioner in her brief herein, the legislative history of 2000e-16 clearly establishes, in our view, that the overriding concern of Congress was to remedy the inequitable situation of federal employees having fewer rights in federal court than all other employees.[8]

[7] The government's argument that since § 2000e-16 does not specify a "standard of review," the scope of review is that under the A.P.A., 6 U.S.C. § 706(2), is founded on the misconception that the court proceeding is one to review the administrative action, *viz.*, a "petition for review," rather than an independent civil action. This notion is belied by the fact that a Title VII plaintiff need not wait for a final agency decision as is the case before an A.P.A. proceeding may be brought, but may file before such a decision once 180 days have expired. Under those circumstances there will be nothing to review. Of course, if Congress intended an A.P.A. proceeding, it would have said so, instead of explicitly stating that the "civil action" would proceed under § 2000e-5 just as any other private action. Finally, A.P.A. review was already available, since any employee whose discrimination claim was rejected would have been a person "adversely affected or aggrieved by [final] agency action" (5 U.S.C. §§ 702, 704). See, *Chambers* v. *United States,* 451 F.2d 1045 (Ct.Cl. 1971); *Polcover* v. *Secretary of the Treasury,* 477 F.2d 1223 (D.C. Cir. 1973). Thus, to accept the government's argument would be to render § 2000e-16 (c) a virtual nullity, and 2000e-16(d) meaningless, since if the "civil action" is an A.P.A. review it is difficult to see what portions of § 2000e-5(f)-(k) would be applicable.

[8] Rather than repeat the analysis of legislative history, we respectfully refer the Court to *Hackley,* to the petition for a writ of certiorari in *Salone* v. *United States,* No. 74-1600, and to *Sperling* v. *United States,* 515 F.2d 465 (3rd Cir. 1975).

The government is left then with two arguments. One is that for "policy" reasons courts should be able to dispose of Title VII actions expeditiously. The Third Circuit in *Sperling* v. *United States,* 515 F.2d at 483-484, and the District of Columbia Circuit in *Hackley* v. *Roudebush,* 520 F.2d at 148-156 and 170-71, forcefully rejected this argument by noting that it is the responsibility of the federal courts to enforce the acts Congress has passed and not try to avoid that duty by so construing statutes as to render them ineffective. See also, *Alexander* v. *Gardner-Denver Co.,* 415 U.S. at 60, n. 21.

The second argument, and the one to which we will address ourselves in detail, is that the administrative remedy available to federal employees is "different" and "better" from that discussed in *Alexander* and so therefore *Alexander* does not apply. The conclusion the government seeks to draw is a non-sequitur because the holding in *Alexander* was that an employee is entitled to a trial in federal court. Even if he were given an administrative remedy precisely equivalent to the one in federal court, *Alexander* does not specifically hold that a federal court can evade its primary responsibility to enforce Title VII by denying a trial *de novo.* At best, the record developed in such a hypothetically equivalent administrative process would be entitled to greater evidentiary weight than would an inferior process. See, 415 U.S. at 60, n. 21. We think, however, it is obvious that the administrative remedy available to federal employees is nowhere near the equivalent of an action brought in federal court pursuant to the Federal Rules of Civil Procedure or Evidence, and will demonstrate that the defects in the procedure discussed in *Alexander* are present in the procedure established by the regulations of the Civil Service Commission. Before doing so, however, we wish to bring to the Court's attention related considera-

tions that require the conclusion that a trial *de novo* must be given as a matter of right.

As indicated in the Statement of Interest of *Amicus,* the Legal Defense Fund has been engaged in the litigation of civil rights cases in federal court for some 35 years. Since the effective date of Title VII in 1965, the Fund has played a leading role in litigating fair employment cases in federal court, both as to procedural issues and as to the merits against some of the country's largest employers. See, *e.g., Ford* v. *United States Steel,* 520 F.2d 1043 (5th Cir. 1975). In the last three years the Fund has become extensively involved in Title VII cases against the nation's largest single employer, the United States government, with a present docket of nearly 30 cases involving agencies such as the Departments of the Army, Navy, and Air Force, the National Aeronautics and Space Administration, and the Postal Service.

Our long experience in litigating civil rights cases in general, and employment discrimination cases in particular, has convinced us that it is only through full plenary trials in federal courts, with the full range of discovery available therein, that adequate determinations of the merits of employment discrimination claims can be made. Whether the case involves individual claims such as in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), or broad class problems such as *Albemarle Paper Co.* v. *Moody,* —— U.S. ——, 45 L. Ed. 2d 280 (1975), a court can properly decide the case only after the parties have had a full opportunity to unearth all the relevant facts. This can be done only if there is available to all parties (and particularly to the plaintiffs, since in the typical employment discrimination case the defendant necessarily has virtually all the relevant information in its possession), the power to subpoena witnesses both for trial and depositions, to

require the production of documents, to conduct and enforce broad discovery in the form of interrogatories and requests for admission and the other devices made available through the Federal Rules.[9]

It is also essential for the proper adjudication of the merits of such claims that it be made by a fully impartial tribunal governed by the extensive body of law developed over the last 10 years in Title VII cases. As recognized by this Court in *McDonnell Douglas Corp.* v. *Green, supra,* and *Alexander* v. *Gardner-Denver Co., supra,* the one tribunal which meets these standards is a federal court. And, it is because of this that Congress has deliberately chosen to place the ultimate responsibility for the enforcement of the vital right of equal employment opportunity in the hands of the federal courts.

The practical affect of the *Chandler-Salone-Haire* approach would be to substantially impair the effectiveness of federal courts as enforcers of Title VII. Under the government's summary judgment procedure they would serve essentially to rubber-stamp agency findings of no discrimination arrived at by a process, as will be described in detail below, that does not permit the development of full records and that is not governed by the law of Title VII.[10]

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[9] The fault in the *Chandler-Haire* approach is to put the burden on the plaintiff to show why he must conduct such discovery. In every employment discrimination case the bulk of the relevant information is necessarily in the hands of the defendant employer. A plaintiff simply cannot show what he might be able to unearth through discovery, until he has propounded and had answered appropriate interrogatories, motions to produce or inspect, and the like. Hence, as much or more so than in any other type of litigation, the normal burden under the Federal Rules to object to and demonstrate why discovery requests should *not* be complied with should be on the party required to respond.

[10] Of some 28 district court decisions by courts affording less than a *de novo* trial since 1973, in each and every case the district court refused to overturn the administrative decision and granted

Under the *Hackley* approach, on the other hand, the administrative record would still serve a useful function. Particularly where there has been an administrative hear-

summary judgment in favor of the defendants. *Salone* v. *United States*, 7 EPD ¶ 9376 (W.D. Okla. 1974); *Sperling* v. *United States*, 7 EPD ¶ 9274 (D.N.J. 1974); *Chandler* v. *Johnson*, 7 EPD ¶ 9139 (C.D. Cal. 1973); *Nimitz* v. *Berzak*, 7 EPD ¶ 9273 (E.D. La. 1974); *Hackley* v. *Johnson*, 360 F.Supp. 1247 (D.D.C. 1973); *Gautier* v. *Weinberger*, 6 EPD ¶ 9001 (D.D.C. 1973); *Tomlin* v. *Air Force Medical Center*, 369 F.Supp. 353 (S.D. Ohio 1974); *Thompson* v. *Department of Justice*, 372 F.Supp. 762 (N.D. Cal. 1974); *Bernardi* v. *Butz*, 7 EPD ¶ 9381 (N.D. Cal. 1974); *Johnson* v. *U.S. Postal Service*, 364 F.Supp. 37 (N.D. Fla. 1973); *Coopersmith* v. *Johnson*, 7 EPD ¶ 9388 (D.D.C. 1974); *Roney* v. *Saxbe*, 8 EPD ¶ 9587 (D.D.C. 1974); *Thomas* v. *Department of State*, 8 EPD ¶ 9622 (D.D.C. 1974); *Roberts* v. *Mumford*, 8 EPD ¶ 9692 (D.D.C. 1974); *Cates* v. *Johnson*, 377 F.Supp. 1145 (W.D. Pa. 1974); *Wormley* v. *Department of the Navy*, 8 FEP Cas. 1008 (N.D. Cal. 1974); *Leinster* v. *Engman*, 8 EPD ¶ 9774 (D.D.C. 1974); *McGowan* v. *United States Information Agency*, 8 EPD ¶ 9787 (D.D.C. 1974); *Allen* v. *Veterans Administration*, 8 EPD ¶ 9783 (W.D. Pa. 1974); *Caro* v. *Schultz*, 9 EPD ¶ 9987 (N.D. Ill. 1975); *Smith* v. *Gunther*, 9 EPD ¶ 9915 (D.D.C. 1975); *Marshall* v. *United States Federal Highway Administrator*, 7 EPD ¶ 9184 (D.D.C. 1973); *Smith* v. *Snyder*, 381 F.Supp. 1083 (E.D. Pa. 1974); *Ettinger* v. *Johnson*, 10 FEP Cas. 642 (E.D. Pa. 1974); *Fisher* v. *Brennan*, 10 FEP Cas. 685 (E.D. Tenn. 1974); *Haire* v. *Callaway*, 9 FEP Cas. 168 (E.D. No. 1974); *Russell* v. *Johnson*, 10 FEP Cas. 924 (W.D. Pa. 1975); *Richerson* v. *Fargo*, 10 FEP Cas. 862 (E.D. Pa. 1975).

In many of these cases the district court's decision is utterly devoid of any discussion of the facts of the case or of what evidence allegedly supports the administrative decision. In cases decided on the merits under the *de novo* standard the difference is striking; the decisions include detailed discussions of the evidence and specific findings as to disputed facts. Plaintiffs have won somewhat more than half of these cases. *Reynolds* v. *Wise*, 8 EPD ¶¶ 9777 (N.D. Tex. 1973), 9778 (N.D. Tex. 1974) (plaintiff won); *Robinson* v. *Warner*, 8 EPD ¶ 9452 (D.D.C. 1974) (court, though denying *de novo* trials generally, gave one in this case; plaintiff won); *McLaughlin* v. *Callaway*, 9 EPD ¶¶ 9888, 10,098 (S.D. Ala. 1974) (court, though denying *de novo* trials generally, gave one in this case; plaintiff won); *Levens* v. *General Services Administration*, 10 FEP Cas. 493 (W.D. Mo. 1975) (government won); *Harris* v. *Ulanich*, No. 73-369-N, E.D. Va., opinion dated November 14, 1974 (government won).

ing, it can be utilized as part of discovery and introduced in the same way depositions are. As the Court noted in *Hackley*, 520 F.2d at 150-51, Title VII plaintiffs typically do not seek delay, but rather the expeditious resolution of their claims. Thus, they would ordinarily be amenable to the proper utilization of the factual material already gathered administratively, 520 F.2d at 156-157, just as is the case in private employment litigation under *Alexander* (see, 415 U.S. at 60).

The Court should also be aware of the importance of the *de novo* issue to other questions that have arisen in Title VII litigation against the federal government, and upon whose resolution rests the effectiveness of the statute. *First*, is whether a federal employer can maintain a class action under the provisions of Rule 23, in the same way as can private and state and local government employees. See, *Albemarle Paper Co.* v. *Moody*, —— U.S. ——, 45 L. Ed. 2d 280 (1975). The government has advanced a variety of reasons why such an action cannot be maintained and the question is still to be resolved by the appellate courts.[11] *Second*, is whether, in those cases brought

[11] The government has variously argued that since a trial *de novo* could not be had neither could a class action be maintained, because such a proceeding would necessarily involve the introduction of additional evidence (see, *Pointer* v. *Sampson*, 62 F.R.D. 689 (D.D.C. 1974)); that, despite this Court's holding in *Albemarle Paper Company* v. *Moody*, 45 L.Ed.2d at 294, n. 8, a class action cannot be maintained unless every member of the class has exhausted administrative remedies (Briefs for Defendants-Appellees in *Swain* v. *Hoffman*, 5th Cir. No. 75-2002, pp. 51-59; and *McLaughlin* v. *Hoffman*, 5th Cir. No. 75-2261, pp. 20-25); and that an individual plaintiff must have filed an administrative "third-party complaint" under 5 C.F.R. 713.251 as a prerequisite to maintaining a class action in federal court (see, *McLaughlin* v. *Callaway*, 382 F. Supp. 885 (S.D. Ala. 1974)). In *McLaughlin*, the government has now, however, acknowledged that the Civil Service regulations "do not permit filing of a class action administrative complaint." Brief for Defendants, p. 13.

under that provision of 42 U.S.C. § 2000e-16 that allows the filing of a court action 180 days after the filing of an administrative charge of discrimination in the absence of a final agency decision, the district court should proceed to trial, or the matter stayed or remanded to the agency for completion of the administrative process. See, *Grubbs* v. *Butz,* 514 F.2d 1323 (D.C. Cir. 1975). *Third,* is whether attorneys' fees can be awarded to a successful plaintiff. Although the government has abandoned its complete opposition to such awards in the face of the clear language of the statute that allowed an award against the government (See, Letter from Irving Jaffe, Acting Asst. Attorney General to Senator Tunney dated May 6, 1975, reprinted in C.C.H., Employment Practices Guide, ¶ 5327.), it may still take the position that attorneys' fees cannot be awarded for work done by counsel in the administrative process prior to the filing of an action under Title VII, even though the plaintiff is successful in the court action.[12] *Fourth,* is an issue arising because the regulations governing the administrative process severely restrict the kinds of cases in which either back pay or a retroactive promotion or hiring may be ordered. They impose a heavy burden on the complainant to affirmatively establish that he would have been given the job in question "but for" the presence of discrimination. In court, the government has

[12] Since the Civil Service Commission has held that there is no basis in its regulations for either the award of counsel fees or for making an attorney available to a complaining federal employee (in contrast, during the administrative process, the agency is usually represented by an attorney from its staff), if the government's position on the *de novo* question is adopted most federal employees would be limited to the record made in a proceeding where he was unrepresented by counsel. Filing an action in federal court, where under the statute counsel may be appointed or his counsel fees reimbursed, will avail him little because he will not be allowed to introduce any new evidence that his attorney might be able to develop through discovery or otherwise.

argued that this rule should govern also, a contention that so far has been rejected by the lower courts because it is contrary to Title VII law.[13] The "but for" rule argued for by the government, coupled with limiting the court to considering only the evidence developed in the administrative process would mean that virtually no federal employees would get any effective relief that would render them whole for injury suffered from discrimination. *Fifth,* the government has linked the *de novo* issue here with the question presented in *Brown* v. *General Services Administration,* No. 74-768, *i.e.,* whether Title VII is the exclusive remedy available to federal employees to correct discrimination and therefore repealed, *inter alia,* 42 U.S.C. § 1981 and the Mandamus Act. (Brief for Respondents in No. 74-768, p. 32).[14]

[13] See, discussion and citations at note 17, *infra.*

[14] There is also a subsidiary issue to the general trial *de novo* question mentioned but not resolved by the Court of Appeals in *Hackley* v. *Roudebush,* 520 F.2d 108, 158, n. 201 (D.C. Cir. 1975). In that footnote, the court suggests that if a plaintiff did not elect to have an administrative hearing or failed to put on certain evidence, he might be barred from so doing in federal court. (This issue is raised in two cases now pending before the Fifth Circuit, *Laurel* v. *United States,* 5th Cir. No. 74-3746, and *Swain* v. *Hoffman,* 5th Cir. No. 75-2002.) The Court of Appeals carefully noted that it was not deciding the issue, and, of course, it is not presented by any of the cases presently before this Court. We do wish to suggest, nevertheless, that it cannot be held that a federal employee waives his right to a full, plenary hearing in federal court if he elects to have his administrative complaint decided without a hearing. An employee, following the investigation, is informed unequivocally that he has a choice of having his complaint decided on the basis of the investigation file *or* after a hearing. In either case, he is told, he has the right to file an action in federal court after the agency decision if he is dissatisfied. There is no hint or suggestion that his rights in court will be diminished if he chooses one option rather than the other; to the contrary, the clear implication is that they will be the same. See, the suggested letter sent to complainants reproduced in App. B, p. 79a. This Court held in *Alexander* that "there can be no

II.

Under the Standards *Alexander* v. *Gardner-Denver*, the CSC Complaint Process Cannot Substitute for a Trial in Federal Court.

A. *Introduction.*

We come now to the basis of the ruling of the court below, and the government's main contention, *viz.*, that since the administrative remedy available to federal employees is different than those discussed in *Alexander* and *McDonnell Douglas Corp.* v. *Green*, the holdings of those cases do not apply. Before discussing why this contention is wrong we wish to emphasize that it is also irrelevant. As we have urged above, both the face of the statute and its legislative history demonstrate that Congress intended that federal employees have the same right to a plenary trial in federal court that all other employees have. Similarly, even if the Eighth Circuit in *Haire* v. *Callaway*, —— F.2d ——, 11 F.E.P. Cases 769 (8th Cir. 1975), were correct (which it is not) in concluding that the administrative remedy plus an independent determination by a federal court based on the administrative record is an "equivalent" remedy to a plenary trial in federal court, the decision still misses the point of *Alexander* and *Green*. Those cases are founded on the principle that Congress has deliberately provided concurrent, overlapping, and *independent* remedies for the elimination of discrimination in employment, see *Alexander* v. *Gardner-Denver Co.*, 415 U.S. at 47-48. Thus, even if one remedy, administrative or otherwise, were in fact equivalent to any other, this would not mean that the first was

prospective waiver of an employee's rights under Title VII" (415 U.S. at 51); certainly there is no knowing or meaningful waiver of a known right or privilege under the administrative scheme here.

either exclusive of or a limitation on the availability of an alternative.

Nevertheless, since the argument that the Civil Service Commission EEO procedures are an adequate remedy and therefore rights in federal court must be limited has been made, we believe it should be met. In the Brief proper, we will discuss the CSC procedures in terms of the analysis in *Alexander* v. *Gardner-Denver*, and will demonstrate that they suffer from the same deficiencies as do the arbitration procedures involved in that case. We have also prepared a detailed description and critique of the process that goes through it step-by-step, and this discussion is contained in Appendix A to this Brief. Both the Brief and the Appendix are based on a variety of sources in addition to the EEO regulations in 5 C.F.R. Part 713 themselves, since the regulations alone do not give either a full or an accurate picture of the EEO complaint process. The first part of Appendix A is an explanation of the sources and methodology used to arrive at the conclusions made here, and we refer the Court to pp. 1a-5a, *infra*. Throughout the Brief we will, with a few exceptions, refer to the Appendix, which cites to the original sources, rather than repeat those citations here.

B. *Summary and History of Part 713.*

Basically the process is divided into four parts, three of which involve the agency and the last the Appeals Review Board of the Civil Service Commission (CSC/ARB), *viz.*: (1) pre-complaint counseling; (2) the investigation; (3) the hearing and final agency decision; and (4) an optional appeal to CSC/ARB.

1. The regulations, and CSC/ARB decisions, require as an absolute precondition to filing a complaint of discrimina-

tion, that an employee first go through informal counseling (see, App. A, pp. 14a-15a). He must see a counselor within 30 days after the occurrence of the event he considers discriminatory. The counselor attempts to bring about a resolution of the problem without the necessity of a formal complaint. After 21 days, if no resolution has been reached, the employee is informed that he may file a formal complaint within 15 days.

2. Upon timely filing of the complaint, and if there are no other procedural bars to it in the opinion of the local EEO officer, an investigator is requested from the agency. The investigator prepares a report, a copy of which, along with a proposed resolution by the local agency head of the complaint, is given to the employee. The employee is informed that he may accept the proposed resolution, have the complaint decided by the national agency head on the basis of the investigative report, or have a hearing by a complaints examiner supplied by the Civil Service Commission. If he chooses the first option, the proposed resolution is put into formal written form and no further action is open to the employee. If he chooses the second or makes no choice at all, the agency issues its final decision and the employee may either appeal to CSC/ARB or file an action under Title VII.

3. If the third option is taken, a complaints examiner is provided by the regional office of the Commission. Following a hearing, the examiner makes a recommended decision to the agency head, which is not given to the complainant until after the final agency decision is rendered. The examiner's recommendation is not binding on the agency.

4. After the final agency decision, the employee may either appeal to CSC/ARB in 15 days or file a Title VII action in 30.

As the Court noted in *Morton* v. *Mancari*, 417 U.S. 535, 546-47 (1974), Congress passed § 2000e-16 and made Title VII applicable to federal employees largely because of dissatisfaction with the existing complaint resolution process set up by the Civil Service Commission. Among the criticisms were the complexity of the system, the delays in processing complaints, the control of the process and final decision-making by the agency-employer, and the focus of the system on identifying individual discriminators rather than on correcting systemic discrimination.

The system thus criticized had been instituted in 1969 by extensive revisions in the existing, largely informal, procedures for handling discrimination complaints. These changes, in Congress' view, were not adequate, and it expected that the system would be reformed as a result of the power provided the Commission in the 1972 Act. However, a comparison of the present CSC regulations dealing with investigation and hearing procedures, which became effective in late 1972, with those in effect during Congressional consideration of § 2000e-16, shows that no fundamental reform of the complaint process has been undertaken. Thus, those provisions of the regulations that are most important for the trial *de novo* issue, are unaltered except for some minor and non-substantive word changes. We call the Court's attention to pp. 57a-61a of Appendix B for a graphic demonstration that the procedure relied upon by the courts below in *Chandler, Salone,* and *Haire* is the same in all essential respects to that criticized by Congress in 1971 as "ineffective." *Morton* v. *Mancari,* 417 U.S. at 547.[15]

[15] None of the major changes in the regulations are directly relevant to the trial *de novo* issue. They include the addition of sections dealing with reprisals (§§ 713.261-713.263), "third-party" complaints (§ 713.251), notification of complainants of their right to sue under Title VII (§ 713.281), and the remedies and corrective action that are available (§ 713.271). Appendix B reproduces

C. The Administrative Process Is Not Equivalent To a Civil Action in Federal Court.

In *Alexander,* this Court discussed three general ways in which arbitration differed from a proceeding in federal court. They were, *first,* the role of the arbitrator and the non-Title VII orientation of the arbitration process; *second,* differences in the fact-finding process; and *third,* the exclusive control over the arbitration process by one of the interested parties. We urge that an examination of the EEO complaint process shows similar deficiencies rendering it also an "inappropriate forum for the final resolution of rights created by Title VII." 415 U.S. at 56.

1. *The Failure to Follow Title VII Law.*

In *Alexander,* the Court noted that discrimination claims required the resolution of statutory or constitutional issues and that this was "especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts." 415 U.S. at 57. Particularly striking in the decisions of the Appeals Review Board and agencies, in investigative reports, recommended decisions of complaints examiners, and the various manuals and directives issued to guide those involved in the decision-making process, is the absence of references to the substantive law of Title VII, particularly as interpreted by the courts.[16]

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in its entirety FPM Letter No. 713-17, which shows all of the changes in the regulations instituted in 1972. This is the document referred to in *Hackley* v. *Roudebush,* 520 F.2d 108, 137, n. 117 (D.C. Cir. 1975).

[16] See, the guidebooks issued to counselors, investigators, and complaints examiners referred to in Appendix A, p. 2a. The Complaints Examiner's Handbook makes no reference whatsoever to any of the numerous court decisions dealing with burden of proof, *prima facie* case, etc. The Bureau of Intergovernmental

Indeed, with regard to at least one particularly crucial aspect of Title VII enforcement the regulations on their face are in direct conflict to established Title VII law. Thus, 5 C.F.R. § 713.271 requires that in order for a complainant to receive a retroactive promotion or back pay, the burden is on him not only to show that he was the victim of racial discrimination, but also that it is "clear" that "but for" the discrimination he would have been promoted, been appointed to the particular job in question, etc. This rule is directly contrary to Title VII law, since the courts have consistently held that once a plaintiff or affected class member has shown discrimination and that he has been denied a job, the burden shifts to the employer to demonstrate by clear and convincing evidence that in spite of the discrimination the employee would not have gotten the position and that therefore he is not entitled to a retroactive promotion or to back pay.[17] The rule similarly ignores this Court's

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Personnel Programs of the CSC does distribute to state and local government agencies a digest of EEO cases prepared in 1974 by the General Counsel's office (BIPP publication 152-46), and the General Counsel's office, since September 1972, has published periodically an abstract of court decisions "for the benefit of the members of the Interagency Advisory Group and other employees concerned with personnel programs and policies." General Counsel's Notes, Vol. 1, No. 1 (Sept. 1972), p. 1. There is no indication in any of the EEO decisions rendered, however, that any of the cases so digested are ever considered. Indeed, it is interesting to note that the first case cited in the former publication (*Hodgson* v. *First Federal Savings and Loan,* 455 F.2d 818 (5th Cir. 1972)), and a case cited in Vol. 1, No. 3 of the latter (*Cooper* v. *Allen,* 467 F.2d 836 (5th Cir. 1972)), are directly contrary to the CSC regulations governing what must be shown in order to obtain back pay. See, *infra.*

[17] See, *e.g., Johnson* v. *Goodyear Tire & Rubber Co.,* 491 F.2d 1364, 1379-80 (5th Cir. 1974); *Meadows* v. *Ford Motor Co.,* 510 F.2d 939, 941-48 (6th Cir. 1975) and the cases cited in n. 16, *supra.* In federal government cases the "but for" rule has been explicitly rejected as inconsistent with the law of Title VII. *Day* v. *Weinberger,* 8 E.P.D. ¶ 9771 (D.D.C. 1974); *Palmer* v. *Rogers,* 10 E.P.D. ¶ 10,265 (D.D.C. 1975).

holding in *McDonnell Douglas Corp.* v. *Green, supra,* that once the plaintiff had established certain basic elements showing discrimination, the burden then shifted to the employer to demonstrate that nevertheless there were valid reasons for not hiring the plaintiff. If the plaintiff in *McDonnell Douglas* had been a federal employee in the administrative process, he would not have made his case for getting a job and back pay if he had only proven the elements set out in that opinion, since he would not have affirmatively established that he would in fact have gotten the job in the absence of discrimination.

The failure to conform to Title VII law with regard to burden of proof is not accidental, particularly with regard to the making of a *prima facie* case by statistical evidence. In a decision rendered in April 1973, CSC/ARB in fact applied proper standards of Title VII law in what was to become a pivotal case in Civil Service Commission EEO enforcement.[18] The Appeals Board noted the showing of a failure generally to promote any Jewish employees above a certain GS level despite their evident qualifications and of the failure to promote the complainants individually. It held that the complainants had established a *prima facie* case of discrimination which the agency had failed to rebut by showing a "nonreligious merit basis" for the failure to promote. Therefore it ordered that appropriate corrective action be taken. The Civil Service Commission reopened the case under § 713.235 and vacated the decision of CSC/ARB, deciding, in effect, that the complainants had not met their burden of proof of establishing not only that there was discrimination, but that they would have gotten some particular job if there had been none. The Commission did *not* find that the agency had shown the negative.

[18] CSC/ARB Decision No. 713-73-465.

(Minutes of U.S. Civil Service Commission, Nov. 14, 1973, p. 324) The result of this decision, which under the regulations has binding precedential affect on both agencies and CSC/ARB, is that ARB since has rarely attempted to rely on statistical evidence to establish a *prima facie* case.[19]

Another deviation from Title VII law is embodied in the handbook used by Complaints Examiners in deciding whether the evidence supports a finding of discrimination. As pointed out in *Hackley* v. *Roudebush,* 520 F.2d 108; 138, n. 129; 171, n. 3 (Leventhal, J., concurring), the examiner is essentially instructed to find discrimination only in those cases where there is no reasonable doubt to the contrary. Thus, the burden on the complainant is significantly more onerous than in a Title VII proceeding under the rule of *McDonnell Douglas Corp.* v. *Green, supra.*

Other examples of failures to follow Title VII law are legion, and include the refusal to recognize the concept of a continuing violation,[20] the refusal to consider systemic or class violations in any meaningful way, and the severe limitations on the kinds of relief available in the administrative process. Despite the repeated description of Title VII as a remedial statute which to be effective must be

[19] The order of the commission reopening and reversing the ARB was dated November 14, 1973. Our study of CSC/ARB decisions (see, App. A, pp. 3a-4a) reveals that prior to December 31, 1973, ARB considered allegations that there was discrimination against the complainant's class generally in 85% of the cases where such an allegation was made (40 out of 47). In 10 of those cases, discrimination was found against the group. After December 31, 1973, on the other hand, such evidence was considered in only 6 of the 20 cases (30%) in which an allegation of general discrimination was made. In 6 other cases (as compared to 1 pre-December 31 case) general allegations of discrimination were considered as only "background information," but not as probative evidence that the individual complainant had been discriminated against.

[20] See, App. A, pp. 12a.

broadly construed,[21] the Civil Service Commission persists in so limiting the kinds of relief obtainable as to render the statute ineffective. We have already noted the "but for" rule, the results of which are that hardly any federal employees have gotten either back pay or retroactive promotions.[22] The standard relief given, if any, is "training" which may lead to a promotion, or at best, priority consideration for the next promotion. CSC/ARB has flatly held that it is powerless, because of the "but for" rule, to grant the kind of systemic class-wide relief that is standard in private Title VII actions.[23]

Thus, just as this Court pointed out in *Alexander* that the specialized competence of arbitrators lay in the meaning of collective bargaining agreements (415 U.S. at 56-57), so the expertise of those officials involved in the processing of EEO complaints relates primarily to the intricacies of federal personnel policy, rather than the substantive law of Title VII.[24] The complaints examiner, for example, has as a primary function the adjudication of such matters as adverse actions against federal employees, reductions in force, etc., rather than racial discrimination. The typical decision at both the agency level and CSC/ARB, limits its inquiry to attempting to find direct evidence of overt discrimination by a particular supervisor.[25] In contrast, where such direct

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[21] See, *e.g.*, *Albemarle Paper Company* v. *Moody*, —— U.S. —— 45 L.Ed.2d 280 (1975).

[22] See, App. A, p. 34a.

[23] See, App. A, p. 35a.

[24] A reading of the decisions demonstrates that the orientation of the persons making them is that of personnel officers, rather than persons experienced in adjudicating racial discrimination complaints. See, *e.g.*, App. A, 22a, n. 24; 38a, n. 56.

[25] This limitation of the inquiry to an attempt to find specific overt acts of racial discrimination is in and of itself contrary to

evidence is not adduced but rather evidence typical of Title VII cases is, namely, evidence relating to the lack of advancement of blacks, women, or other minority groups in general, the decisions then proceed to explanations of why in the particular case the non-selection of the complainant was justified under personnel practices.

2. *Deficiencies in the Fact-Finding Process.*

Hackley v. *Roudebush, supra,* noted that the administrative process available to federal employees "falls short of a Title VII action in certain of the crucial respects stressed in *Alexander* v. *Gardner-Denver*" relating to fact-finding (520 F.2d at 171 (Leventhal, *J.*, concurring)). At no point in the process does a complainant have available to him anything equivalent to discovery. He can request the investigator to make certain inquiries, but the investigator is under no compulsion to do so.[26] At the hearing stage, if the complainant seeks to have information furnished him prior to the hearing so that adequate preparation can be made, whether the request be in the form of interrogatories, the production of documents, or the interviewing of witnesses, he is told that the complaints examiner has no power to require the agency to furnish such information and whether or not it will is wholly within the agency's discretion.[27] The effect of these limitations is to put the complainant at a severe disadvantage since, as the courts have often recognized, in an employment discrimination case the evidence uniquely tends to be in the hands of the

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prevailing Title VII law. See, *e.g.*, *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377, 1382 (4th Cir. 1972), and was cited by Congress in 1971 as a major deficiency in the CSC process. See, H. Rep. No. 92-238, on H. R. 1746, 92d Cong. 1st Sess., at 24 (1971).

[26] See, App. A, pp. 25a-26a.

[27] *Id.*, at 36a; App. C, p. 90a.

defendant, and the plaintiff must have access to it *before* trial. See, *e.g., Rich* v. *Martin Marietta Corp.*, 522 F.2d 333, 342-43 (10th Cir. 1975). Indeed, the complaints examiner has no subpoena power at all. He can request that employees of federal agencies be produced at the hearing, but if, as for example was the case in *Hackley* (520 F.2d at 114, n. 15), an important witness is no longer employed and does not appear voluntarily, there is simply no way to obtain his testimony.

The process itself is specifically stated to be non-adversarial; it does not purport to be like a hearing in court, but is defined as an adjunct to the investigation.[28] The consequences for the complainant are severe. Although there is said to be no burden of proof, if the complainant does not, for example, prove and make the record "clear" that he would have gotten a job "but for" discrimination, he will find out from the agency head or CSC/ARB, after it is too late to do anything about it, that he has not established his right to get any effective relief.[29]

There is no provision whatsoever in the regulations for furnishing a complainant with an attorney. The complainant is entitled to have a representative, but if he cannot afford to hire his own lawyer, the only thing he can do is to attempt to get an attorney who works for the same agency to represent him. An attorney employed by the government but working for another agency is unlikely to do so because under the regulations he is not entitled to administrative leave, but must use up annual leave or take an unpaid leave of absence.[30] On the other hand, the agency

[28] *Hackley* v. *Roudebush*, 520 F.2d 138, n. 129, 171. App. A, pp. 29a-30a.

[29] See, App. A, p. 30a, n. 40.

[30] See, App. A, pp. 28a-29a.

is generally represented by an attorney at the hearing, particularly in the case of military departments which are able to rely on staff judge advocates to appear for them.[31] Thus, in many instances, a complainant must either attempt to present his own case or rely on a lay advocate to assist him. Given the complexities of proving a discrimination claim and the difficulties in marshalling proof, it is not surprising that the records developed in such proceedings are often inadequate to establish even a *prima facie* case of discrimination.

Finally, the limitations on consideration of statistical data and evidence of general practices with regard to minorities make the fact-finding process wholly inadequate. Complaints examiners refuse to allow the admission of such evidence on the ground that it cannot be relevant to individual claims of discrimination, and class claims cannot be raised in an individual complaint proceeding. These restrictive rulings are consistently affirmed by CSC/ARB[32] in disregard of this Court's holding in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. at 804-805, and numerous decisions by lower federal courts (see, *e.g., Burns* v. *Thiokol Co.*, 483 F.2d 300 (5th Cir. 1973), and cases there cited, and *Rich* v. *Martin Marrietta Corp.*, 522 F.2d 333 (10th Cir. 1975)).

3. *The Exclusive Control By the Agency of the Process.*

In *Alexander*, the Court noted that one problem with deferring to an arbitration proceeding was that the process was under the control of the union, which often might be an interested party (415 U.S. at 58, n. 19). The situation is the same with regard to the adjudication of EEO com-

[31] See, *e.g.*, the case discussed in App. A, p. 29a, n. 39.

[32] See, App., pp. 30a-31a.

plaints. At every stage in the agency proceeding the entire process is under the control of the agency, the ultimate defendant in a Title VII case. The EEO counselor is an employee of the local office of the agency; the EEO officer is also and indeed is often connected with the division whose head also supervises the personnel office. The investigator is an employee of the agency, whose role is only to recommend a resolution that is acceptable to the local agency head. He is dependent on the local agency personnel for obtaining information, since he has no subpoena power.

At the next step, a complaints examiner is provided by the Civil Service Commission. However, he does not function independently from the agency in the way that an administrative law judge does. He has no power to require the agency to provide information prior to the hearing, and even at the hearing itself he does not have available compulsory process. He does not himself make the decision, but only forwards a recommended decision to the head of the agency, the person who will ultimately be the named defendant in any action brought under Title VII. A complainant has no right to see the recommended decision or the transcript of the hearing before the final decision is made.

The agency head need not adopt the recommended decision of the complaints examiner, and not surprisingly a decision finding no discrimination is almost always adopted, whereas decisions recommending a finding of discrimination are not followed in about 25% of the cases.[33] Although the regulations purport to require the agency head to give his reasons why he does not adopt the recommended decision of the complaints examiner, this provision is not effectively enforced.[34]

[33] See, the statistics cited in App. A, p. 32a, n. 44.

[34] See, App., pp. 31a-32a, n. 43.

At this point, the complainant can go into federal court; thus, the fact that an appeal to CSC/ARB can be taken is irrelevant as far as the trial *de novo* issue is concerned (see, *Hackley* v. *Roudebush*, 520 F.2d at 154-155). In any event, ARB does nothing but review the record made at the agency level and affirms findings of no discrimination in more than 96% of the cases.[35]

4. *Other Variations from Court Proceedings.*

In addition to the deficiencies similar to those in the arbitration process discussed in *Alexander*, the EEO complaint process is different from a court proceeding in other important respects. As discussed at some length in Appendix A (pp. 6a-9a; 12a-13a; 18a-22a), a complainant is faced with a variety of technical and rigorously enforced procedural hurdles before he can get a decison on the merits. Thus, he must pick one of a variety of alternative procedures without full information as to the consequences of selecting one as opposed to another; he may, thereby, inadvertently waive important rights. (App. A, 23a-24a). He must meet *two* limitations periods before a complaint can be filed (*Id.*, 18a). If the complaint fails to meet the various deadlines imposed on him, the proceeding is either terminated or restricted in scope. On the other hand, if the agency fails to act within specified time periods there are, with one exception,[36] no similar consequences. In short,

[35] See, Brief for Respondents in *Brown* v. *G.S.A.*, No. 74-768, App. C, p. 53a. See, App. A, p. 33a, nn. 46 and 48. According to statistics compiled by the CSC, in FY 1973 and 1974 combined, agencies rendered 2250 decisions *on the merits* in EEO cases. There were final agency decisions finding discrimination in 308 or, 13.7%.

[36] Section 713.220 provides that *if* the complaints examiner recommends a finding for the complainant and *if* the agency does not issue its decision within 30 days after submission of the recommended decision, and *if* a final agency decision has not been

there are no such devices as a default judgment or other enforceable sanctions against a dilatory defendant as exist in the Federal Rules. Finally, not only are the rules under which EEO complaints decided not in conformity with Title VII law, but they are secret. Decisions of CSC/ARB are virtually unobtainable; the fact that the Commission has reopened cases under § 713.235 is unknown (counsel for *amicus* learned of them literally by accident), and the documents explaining them are difficult to obtain.

In sum, a complainant is cast adrift in a system of unnecessary complexity, that operates according to rules that can not be readily determined, in which the power over what evidence is to be considered is in the hands of the defendant, and in which that same defendant is the judge. However this process might be characterized, it is clearly not equivalent to an action in federal court.

CONCLUSION

The proper resolution of the issue in this case depends upon a recognition of the relationship between the substantive rights guaranteed by Title VII, and the procedures available in federal courts to enforce them. The rules established by decisions of this Court, relating to such procedural questions as burden of proof,[37] trial *de novo*,[38] class

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rendered within 180 days after the date the complaint was filed, then the recommended decision becomes the final agency decision and cannot be rejected. The instances of this occurring are relatively rare, particularly since complaints examiners recommend for the complainant in only a small percentage of the cases.

[37] *McDonnell Douglas Corp.* v. *Green, supra.*

[38] *Alexander* v. *Gardner-Denver Co., supra.*

actions and equitable discretion,[39] the right to counsel fees,[40] and the existence of alternative remedies,[41] as well as the extensive body of law developed by the lower federal courts on these and other issues such as the right to broad discovery[42] and the scope of class actions[43] are all founded upon this relationship. Title VII is a remedial statute, intended by Congress to correct one of the great ills of our society. Its broad pronouncements as to rights cannot be made realities unless the procedures available to the courts are correspondingly broad and effective. This Court has already held, in *Morton* v. *Mancari,* 417 U.S. 535, 546-47 (1974), that the purpose of the 1972 amendments embodied in 42 U.S.C. § 2000e-16 was to make the substantive law of Title VII applicable to the federal government. This purpose can be realized if, and only if, the procedural law of private Title VII law is also fully applicable.

For the foregoing reasons, the decision of the court below should be reversed.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
CHARLES STEPHEN RALSTON
BILL LANN LEE
MELVYN LEVENTHAL
ERIC SCHNAPPER
Suite 2030
10 Columbus Circle
New York, New York 10019
Attorneys for Amicus Curiae

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[39] *Albemarle Paper Co.* v. *Moody, supra.*

[40] *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400 (1968).

[41] *Johnson* v. *Railway Express Agency,* 421 U.S. 454 (1975).

[42] See, *e.g., Burns* v. *Thiokol Corp.,* 483 F.2d 300 (5th Cir. 1973).

[43] See, *e.g., Johnson* v. *Georgia Highway Express, Inc.,* 417 F.2d 1122 (5th Cir. 1969).

APPENDIX A

Explanation and Critique of the EEO Complaint Process

APPENDIX A

Explanation and Critique of the EEO Complaint Process

A. *Introductory Note: Sources and Methodology*

The discussion in the Brief and the following analysis of the administrative complaint system begins with the regulations themselves, including not only Part 713, but other Parts of Title 5 of the Code of Federal Regulations, and with those sections and publications in the Federal Personnel Manual (FPM) interpreting them. As the Court will note, however, the regulations and the FPM, deal with procedures, and virtually the only substantive rule is in 5 C.F.R. ¶ 713.271 relating to when an award of back pay or a retroactive promotion may be given. The interpretations of the regulations are found in a variety of manuals and other explanatory material sent out by the Civil Service Commission.[1] These include, *Equal Employment Opportunity Counseling, a Guide Book* (Personnel Methods, Series No. 19, 1973); *Investigating Complaints of Discrimination in Federal Employment* (Personnel Methods, Series No. 17,

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[1] In a letter dated October 24, 1974, the Acting Chief of the Discrimination Complaints and Enforcement Section, United States Civil Service Commission, informed amicus that the following materials are those relied upon by the Section "in providing assistance to complainants and agencies in the processing of EEO complaints." (1) FPM Letter No. 713-17 (reproduced as Appendix B); (2) FPM Letter No. 713-21; (3) FPM Letter No. 713-28; (4) FPM Letter No. 713-20; (5) Letter of Chairman Robert Hampton to Arthur Sampson, head of the General Services Administration, dated June 18, 1973; (6) FPM Bulletin No. 713-34; (7) FPM Bulletin No. 713-35; (8) Personnel Methods Series No. 18 (dealing with Adverse Action Appeals); (9) Appendix B-6, FPM Chapter 713; (10) Personnel Methods Series No. 17 (on file with the Clerk of Court). Letter from Walter J. Dent to Phyllis McClure (reproduced in Appendix C, *infra*, p. 81a).

1971); *Discrimination Complaints Examiner's Handbook* (1973); and a letter memorandum dated January 27, 1975, from Irving Kator, Assistant Executive Director of the CSC, to agency Directors of Equal Employment Opportunity and Directors of Personnel explaining the relationship between individual EEO complaints and so-called "Third-Party" allegations (or complaints) of discrimination.

As this Appendix was being written, *amicus* learned that the CSC had recently issued a revised Counselor's Guidebook (October, 1975) and a revised Investigator's Guidebook (March, 1975). We have reviewed both, and believe that no substantive changes have been made in either. The new investigator's guidebook in particular mainly rearranges existing sections. The discussions in each as to the scope of the investigation—the key provisions—are essentially the same. *Compare,* pp. 8-12 and 15-17 of the old guidebook with pp. 21-26 and 29-32 of the new. The draft of the new investigator's guidebook was analyzed by the Civil Rights Commission in its recent report, and found to be largely unchanged. See, *The Federal Civil Rights Enforcement Effort—1974, Vol. V. To Eliminate Employment Discrimination* (July, 1975), at pp. 71-75. We have also obtained a copy of a draft of a new Complaints Examiner's Handbook that is being prepared. It too does not seem to contain any substantive changes; in particular, the hearing is still described as non-adversarial and there is no right to pre-hearing discovery. We have lodged with the Clerk of the Court copies of the four guidebooks and the two versions of the Complaints Examiner's Handbook for the convenience of the Court. They will be cited as follows: "Counselor's Guidebook;" "Revised Counselor's Guidebook;" "Investigator's Guidebook;" "Revised Investigators Guidebook;" "Handbook;" and "Revised Handbook."

In individual cases that are appealed to the Civil Service Commission decisions are rendered by the Appeals Review Board (formerly the Board of Appeals and Review), referred to here as CSC/ARB, that are based on the regulations and various interpretations of them. However, under the regulations CSC/ARB decisions have no precedential value, they do not interpret or apply Title VII law as developed by the courts, and are essentially *ad hoc* decisions. 5 C.F.R. § 713.235 permits the complainant, the agency (or the Commission) to request that the Commissioners themselves re-open and reconsider any ARB decision. Under § 713.235, Commission decisions have precedential value and govern subsequent interpretations of the regulations by ARB and the agencies.

In December, 1974, *amicus* obtained from a regional CSC office a set of all the decisions of the Appeals Review Board from September 6, 1972 to July 1, 1974, more than 1,000 decisions. After Fiscal Year 1974, all CSC/ARB decisions were no longer made available to regional offices. However, since 1973, CSC/ARB has published on a monthly basis a "Digest of Significant Decisions," including EEO decisions under Part 713, to which *amicus* subscribes. In addition, since July 1, 1974, we have obtained a number of CSC/ARB decisions dealing with such important questions as burden of proof, class actions, continuing violation, etc.

Early this year, *amicus* learned that the Civil Service Commission had, on eight occasions involving a total of thirteen complainants, considered requests that CSC/ARB decisions be reopened under § 713.235. Six cases, involving nine individuals, were reopened. Three dealt with procedural questions and three with the merits. *Amicus* obtained copies of the minutes of these actions, which consist of a

very brief summary of what had been done. Upon making a request under the Freedom of Information Act, we learned that the Commission did not issue or publish opinions as such; however, we were supplied with material, in the form of letters to either the agency or the complainant, that did give reasons for the action.

The decisions of CSC/ARB were analyzed as follows. Staff counsel for *amicus* surveyed the decisions and prepared analytical index sheets. A group of senior law students from Columbia University reviewed all the decisions and indexed them. A number of topic areas were then designated, and the students read all decisions relating to each, and prepared papers analyzing the decisions. Counsel reviewed the papers, cross-checked the CSC/ARB decisions for accuracy, and analyzed further in light of the Digest of Significant Decisions and the Commission reopenings. In this way, we were able to ascertain the various rules under which the decisions were rendered.

In addition to the above materials, we have also had access to investigative reports and EEO hearing transcripts in particular cases. Finally, counsel for *amicus* have themselves represented complainants in EEO investigations and hearings. The analysis that follows is based on a synthesis of our research into and experience with the EEO complaint process.

CSC/ARB decisions are cited in three ways: (1) decisions rendered up to June 31, 1974 were indexed under Part 713 and numbered in chronological order, e.g., 713-73-593, and will be cited here in the form "ARB, 713-73-593"; (2) decisions *after* June 31, 1974, that *amicus* has do not have index numbers on them, and will be cited by date and complainant's name (*e.g.*, ARB, Oct. 21, 1974

(*In re Smith*)); (3) decisions in the Digest of Significant Decisions are given digest numbers in the form, RBO 71360025, and will be so cited with a reference to the volume and page of the Digest, thus, "RBO71360025, Digest 2, p. 12." We have included in Appendix C a complete ARB decision (at pp. 82a-85a), as an example Citation to decisions on reopenings by the Commission itself will be to the date of the Commission minutes and to a description of the explanatory material obtained. All of the materials referred to or used in the following analysis can be obtained from the Washington office of the Commission.

A similar analysis of the complaint system is contained in a recent report of the United States Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974, Vol. V, To Eliminate Employment Discrimination* (July, 1975) [hereinafter, "CRC Report"] at pp. 61-86, 619-23 and 656-58. These excerpts have been reproduced as an Appendix to the Brief for Petitioner in *Brown* v. *General Services Administration,* No. 74-768. The Civil Rights Commission report not only describes and draws conclusions about the process, but recommends that, "The Commission should issue completely revised complaint procedures which provide Federal employees charging discrimination a full and fair proceeding consistent with Title VII standards." *Id.* at 656. The complaint procedures were also analyzed earlier in a report prepared by Ralph Nader's Public Interest Research Group, M.W. Brewer, Jr., *Behind the Promises: Equal Employment Opportunity in the Federal Government* (June, 1972). This study has recently been edited and incorporated in R. G. Vaughn, *The Spoiled System, A Call for Civil Service Reform* (1975).

B. *The Regulatory Scheme*

The CSC system for processing EEO complaints can best be analogized to common law pleading in its complexity and opportunities for missteps. The first difficulty arises in choosing which of many routes one should pursue, since in addition to the regular complaint procedure under 5 C.F.R. §§ 713.211-713.236, 713.271, and 713.281-713.283, there are a variety of other procedures under which complaints raising discrimination related claims may be pursued. These include:

(1) Charges of reprisal because of filing of a complaint of discrimination (5 C.F.R. §713.261-.263);

(2) "Third-party complaints" (5 C.F.R. § 713.251);

(3) Complaints of racial discrimination as a defense to an adverse action (*e.g.*, suspension, dismissal, withholding of wage increase, etc.) (5 C.F.R. § 772.306);

(4) Appeals from termination at the end of a probationary period (5 C.F.R. Part 315);

(5) Challenges to C.S.C. required job requirements (e.g., tests or educational qualifications) (5 C.F.R. § 300.103-300.104);

(6) Appeals from a Reduction in Force Action (5 C.F.R. Part 351);

(7) Grievances (5 C.F.R. Part 771);

(8) Appeals from assignment of grade (5 C.F.R. Part 511).

Some of these procedures will be discussed, *infra*, in greater detail. The point to be made here is that, for example, an employee who is faced with an adverse action or a probationary employee who is terminated before he has acquired tenure, and who wishes to charge discrimination must elect to proceed either under Part 713 or under Part 772 (adverse action) or Part 315 (probationary employee). He is informed of the different internal procedures that will be followed, *e.g.*, under Parts 772 and 315 the initial decision is made by the Federal Employees Appeals Agency at the regional CSC office, rather than by the agency itself. He is not informed, however, that if the adverse action is reversed on a procedural ground, then the underlying discrimination claim will never be reached.[2]

[2] The complexities of the system can be illustrated by a case counsel for *amicus* handled. Complainant filed an EEO complaint under Part 713 in July of 1973. In September, on the day an investigator arrived, complainant was informed that his discharge from the service was being proposed under adverse action procedures. The local EEO officer then cancelled the EEO complaint on the ground that the discrimination claim could be raised in the adverse action proceeding. Complainant filed both a complaint and a charge of reprisal under § 713.261 (see, *infra*, p. 36a), and, as a result, the discrimination complaint was reinstated. However, when the complainant was discharged, the agency took the position that the discrimination complaint merged into the adverse action appeal. Complainant protested that the regulations did not so provide and that he was entitled to have the discrimination and reprisal complaints processed expeditiously and independently of the appeal. The CSC refused to so order and informed him that the discrimination and reprisal charges would be considered as part of his appeal. However, his discharge was reversed on a procedural ground (in July 1974, the following year) and the discrimination claim was never reached. He then requested the CSC to require the processing of the EEO claim, now a year old (the regulations require that it be disposed of in 180 days), but got no reply. In the meantime, the agency appealed the decision ordering his reinstatement to CSC/ARB, thereby automatically staying his return to work. CSC/ARB affirmed and he returned to his job in December, 1974. He filed an action under Title VII at the same time, since his underlying complaint of racial discrimination had never been resolved. Subsequently, the United States moved to remand

He is also not informed that if he chooses any avenue other than Part 713, he will not, at its end, be informed that he has a right to sue under Title VII. See, *infra*, pp. 37a-38a.

Moreover, because of the short and strictly enforced time requirements for filing under the various provisions, if a complainant chooses the wrong avenue, by the time he discovers his error it will be too late to file under the proper one. This problem arises particularly when an employee seeks to challenge a CSC job qualification by proceeding under Part 713. He will discover that such a challenge is "not within the purview" of that Part, since it covers only *agency* actions, too late to file under Part 300, the only means for challenging CSC actions[3] (see *infra*, pp. 38a-40a).

The administration of Part 713 itself suffers from a similar rigid application of technical rules, the result of which is either to eliminate a substantial number of complaints without ever reaching the merits, or to severely restrict the scope of inquiry. The narrowing of the process begins with the complaint form which requires that a particular person be named as the discriminator and one specific act be designated. The focus of the inquiry is still based on the assumption "that employment discrimination is primarily a matter of malicious intent on the part of individuals," precisely the defect noted by the House Re-

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the case to the agency for further processing of the administrative complaint (see Brief, *supra*). As part of that request, the agency ordered, in April 1975, that the investigation of the EEO complaint be resumed. The District Court denied the motion to remand, noting the passage of 780 days since the complaint was filed without final action. See, *McHoney* v. *Callaway*, E.D.N.Y., C.A. 74-C-1729 (Oct. 10, 1975).

[3] Unless the CSC is the employing agency, in which case Part 713 must be used. See n. 26, *infra*.

port cited in *Morton* v. *Cancari*, 417 U.S. 535, 547 (1974).[4] Thus, the common outcome of the process is that charges against an individual are explained away by reference to personnel policies or other reasons that do not deal with systemic types of discrimination.[5]

The process that a Federal employee must follow may be contrasted with that under the Equal Employment Opportunity Commission, used by all other employees. The EEOC investigation is deliberately broad and wide ranging. It seeks to uncover and correct systemic problems and to afford effective relief not only to the individual complainant, but to all affected persons. See, EEOC Compliance Manual, Investigations, ¶¶761-905, CCH Employment Practices Guide. See also, *Graniteville Co.* v. *EEOC*, 438 F.2d 32 (4th Cir. 1971). The results obtained by EEOC are similarly broad and effective, despite its lack of plenary administrative enforcement power such as the CSC has; thus, in Fiscal Years 1974 and 1975, the EEOC obtained more than 160 *million* dollars in back pay for 100 *thousand* employees. See, text at n. 50, *infra*. Indeed, Congress expceted that the CSC consult with the EEOC because of its knowledge and experience, and develop its EEO programs

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[4] H.R. Rep. No. 92-238, on H.R. 1746, 92d Cong., 1st. Sess., 23-25 (1971); see also S. Rep. No. 92-415, on S. 2515, 92d Cong., 1st. Sess., 14 (1971).

[5] For example, in the case reproduced in App. C, pp. 82a-85a, *In re Jones*, although systemic discrimination was found that adversely affected the complainant, it was laid to the *former* supervisor. Since the present selecting official was not himself shown, to ARB's satisfaction, to have discriminated personally, neither a retroactive promotion nor back pay was awarded. In another case, ARB, May 6, 1975 *(In re Williams)*, ARB noted that the agency (the Tennessee Valley Authority) had never hired a black into the particular job in question, but denied relief to the complainant by accepting without question the agency's explanation why he was not hired. See also C.R.C. Report, p. 66, n. 219.

Appendix A

along similar lines. S. Rep. No. 92-415, on S. 2515, 92d Cong., 1st Sess., p. 16 (1971).

C. *Part 713 Procedures*

A flow chart of the complaint process under Part 713 follows. It should be noted that the process is potentially more complex than the chart indicates, since a complaint may be rejected or cancelled at certain points for failure to prosecute (see, 5 C.F.R. § 713.220(b)). Thus, for example, if a complainant does not show up for a meeting with the investigator (see chart, 4.c.), the complaint may be cancelled.

(See Opposite) ☞

FLOW CHART: EEO COMPLAINT PROCESS - 5 C.F.R. Chapter 713

(Key: the times to the left are mandatory time periods; the time periods to the right in parentheses indicate time periods in which the agency is supposed to do something)

1**ACT OF DISCRIMINATION
30 DAYS
2**FIRST INTERVIEW WITH EEO COUNSELOR: NOTICE OF RIGHT TO FILE FORMAL COMPLAINT
(21 days)
3**FINAL INTERVIEW W/COUNSELLOR: [b. COMPLAINT REJECTED [for procedural reasons]
15 DAYS
4**WRITTEN COMPLAINT FILED - - -

Appendix A

1. Act of Discrimination (713.213(a); 713.214(a)(1)(i))

The civil service regulations do not recognize the concept of a continuing violation.[7] Thus, something must have happened to the complainant within the thirty-day period before he goes to see an EEO counsellor. (The thirty days runs either from the date of a discriminatory act or from the effective date of a personnel action, if that action is claimed to be discriminatory). Although events occurring *prior* to the 30-day period can be used as "background material," relief can be given only as to events within the period, no matter what the relationship of the earlier events to the occurrence considered to be timely.[8]

[7] CSC/ARB has flatly held that, "there is no provision [in the regulations] whatsoever for accepting non-specific complaints of 'continuing' discrimination." (ARB October 15, 1974, *(In re Conner)*). We think this position is wrong, since it conflicts with a number of decisions upholding the concept. *Cox* v. *United States Gypsum*, 409 F.2d 289 (7th Cir. 1969); *Boudreaux* v. *Baton Rouge Marine Contracting Co.*, 437 F.2d 1011 (5th Cir. 1971). See also, CRC Report at p. 65, n. 218, and *Ettinger* v. *Johnson*, 518 F.2d 648 (3rd Cir. 1975).

It should be noted that § 713.213 as it was in effect from 1966-69 (see, 31 Fed. Reg. 3069, 32 Fed. Reg. 15631), *did* contain a provision that, "A complaint concerned with a continuing discriminatory practice having a material bearing on employment may be filed at any time." This provision was subsequently deleted.

[8] ARB May 6, 1975 *(In re Williams)*. In *Williams*, a black challenged his failure to be hired as a heavy equipment operator by the Tennessee Valley Authority (no black had ever been hired for the job). The reason given for his not being hired was his lack of training as a crane operator. Complainant also alleged, however, that blacks had generally been excluded from the apprenticeship program that gave the training alleged to be necessary. These facts were considered only as they indicated a "possible pattern of discrimination directed against the complainant individually which might have a direct bearing on the matter forming a proper basis for a complaint." However, no relief could be afforded for such past actions. See also, CRC Report, at p. 65.

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The thirty-day rule has been strictly construed by CSC/ARB. Thus, although § 713.214(a)(4) provides that:

> The agency shall extend the time limits in this section (i) when the complainant shows that he was not notified of the time limits and was not otherwise aware of them, or that he was prevented by circumstances beyond his control from submitting the matter within the time limits; or (ii) for other reasons considered sufficient by the agency. . . .

In fact, few reasons for failing to comply are accepted.[9]

It should be noted that the 30-day rule is purely administrative. Title VII does not specify a time limit for filing a charge against the federal government as it does for filing a charge with the EEOC. Thus, the rigidity with which the rule is imposed seems particularly unjustified,

[9] In 1972-1974, CSC/ARB decided 90 appeals involving timeliness of initial contact with the counselor. There were 73 affirmances of agency findings of untimeliness, 5 remands for further fact-finding as to the reasons for untimeliness, and only 12 decisions accepting reasons given by complainants. These mostly involved cases where complainants had proven they were misinformed by agency personnel.

BAR has rejected explanations that military obligations prevented contacting a counselor for three months (No. 713-73-368); that the employee had been assured by his union that it would handle the matter (No. 713-73-417); that management had said the matter would be handled "informally" (No. 713-74-508); even where the complainant was on authorized sick leave with severe illnesses the case was only remanded to determine whether he could have contacted a counselor nevertheless (No. 713-73-433). See also, No. 713-74-374, discussed *infra* at n. 12, where the fact that the employee was in jail for two months was not a sufficient excuse. The fact that a complainant started out in one of the other CSC procedures available does *not* toll the period for going to a counselor. See, *e.g.*, Nos. 713-74-66; 713-73-527; 713-74-399 (following grievance procedures does not excuse failure to go to an EEO counselor).

especially in view of the refusal of the CSC to recognize no longer the concept of a continuing violation.

2. Interview With Counselor (713.213(a))

Although § 2000e-16 itself speaks only of the filing of an "initial charge", the CSC regulations provide that a complainant first must go to an EEO counselor and attempt informal resolution before he can file a "formal" complaint of discrimination. The counseling process is an absolute prerequisite to filing a complaint. Moreover, the fact that a complaint was sought to be filed within the time period will not cure a failure to follow the counseling process.

One effect of the counseling requirement is to extend the 180-day period in the statute to 201 days, since the regulations require that at least 21 days be spent in counseling. Thus, the counseling requirement is arguably in conflict with § 2000e-16, since one of Congress' main concerns was delays in the process.

Counselors are not full-time EEO people, but are assigned to act as counselors part-time away from their regular jobs. The counselor's role is to attempt an informal settlement of the problem within 21 days; indeed, more than ⅓ of all complaints filed government-wide were so disposed of.

No firm data is available as to the kinds of "corrective action" taken as a result of counseling.[10] Nevertheless, it

[10] EEO offices fill out monthly reports on counseling that set out the following categories of corrective action: (1) "agency improved personnel practices"; (2) "promotion received"; (3) "training opportunity received"; (4) "reappointment/reinstatement"; (5) "requested reassignment received"; (6) "Adverse Action reduced or rescinded"; (7) "other disciplinary action reduced or rescinded"; (8) "Priority consideration for next promotion"; (9) "Other."

is clear that such action is most often of a limited nature. For example, it is impossible for counselors to get anyone either a retroactive promotion or back pay since the regulations make a finding of discrimination a precondition for both (713.271), and counselors have no power to make such a finding. Congress was critical of the whole concept of informal resolution of complaints since it "denied employees adequate opportunity for impartial investigation and resolution of complaints." H.R. Rep. No. 92-238 on H.R. 1746, 92d Cong. 1st Sess., at 23 (1971). S. Rep. No. 92-415 on S.2515, 92d Cong., 1st Sess., at 14 (1971).

Under the system as administered, only about 10% of the persons who go to see a counselor file a complaint. About 35% more receive some sort of "corrective action" as a result of counseling. The other 55% neither file nor get any relief. (See, Brief for Respondents in *Brown* v. *G.S.A.*, No. 74-768, at pp. 48-49). While there is no firm data as to what happens to that 55%, it is notable that the EEO counselor's guidebook, at p. 1, notes with pride the fact that only one out of ten persons file a complaint. Thus, while the regulations state that counselors are not supposed to prevent persons from filing (§ 713.213), counselors are certainly not led to encourage people to do so. Again, EEOC practice may be contrasted; there, the first thing that is done is the filling out and filing of a written complaint, *after* which investigation and conciliation is pursued.

3. Notice of Right to File (713.213(a))

At the end of 21 days, if there has been no disposition agreed upon by both the complainant and the agency, the counselor is to give the complainant a letter notifying him of his right to file a discrimination complaint within 15

days after a final interview with the counselor. (The failure to give such notice carries no sanction against the agency.)

4. Filing of the Complaint (713.214)

Within 15 days the formal written complaint must be filed with the EEO officer, or other designated official,[11] or it will be rejected as untimely.[12] CSC considers that the 180-day period at the end of which a civil action may be filed in court runs from the date of filing of the administrative EEO complaint, and some agencies take the position that the complaint is not "filed" until the EEO officer sends a letter of formal receipt. Thus, the date of receipt is not necessarily determinative. In some instances, EEO officers neither formally accept or reject a complaint on the grounds attempts are being made to resolve it "informally." Like the counseling requirement, these filing procedures have the effect of further extending the 180-day provision of § 2000e-16 in which a civil action may be filed.

The letter from the EEO counselor may note that it is preferable that the complaint be on the standard agency form.[13] The form requires that an "alleged discriminatory

[11] The regulations specify that the complaint may also be filed with the agency director of EEO; in every instance, the complaint is sent to the local EEO officer for processing.

[12] Section 713.214(a)(3) provides that it is timely if postmarked within the 15-day period as long *as it is addressed to one of the officials designated by the agency*. This requirement is also strictly construed. Thus, a complainant mailed a complaint well within the 15 days, but addressed it to the "Equal Employment Opportunity Office, Washington, D. C." The letter was delivered to the EEOC, which re-routed it to the agency EEO office, but not until 34 days had passed. ARB affirmed the agency's rejection of the complaint as untimely (ARB, No. 713-74-574). This result was later rejected as a defense to a Title VII action. *Hunt* v. *Schlesinger*, 389 F. Supp. 725 (W.D. Tenn. 1974).

[13] See, Revised Counselor's Guidebook, p. 14.

official" be named (in contrast the form used by the EEOC only requires that the company or the union be designated). Since most often the problem is with an immediate or close supervisor, this puts the complainant in the uncomfortable position of bringing charges against the person who will have the greatest control over his future career. The focus of the complaint process on seeking to establish individual, and usually overt, acts of discrimination, rather than on systemic problems impinging on minority employees as a class, was one of the main criticisms voiced by Congress in 1971.[14]

[14] "Aside from the inherent structural defects the Civil Service Commission has been plagued by a general lack of expertise in recognizing and isolating the various forms of discrimination which exist in the system. The revised directives to Federal agencies which the Civil Service Commission has issued are inadequate to meet the challenge of eliminating systemic discrimination. The Civil Service Commission seems to assume that employment discrimination is primarily a problem of malicious intent on the part of individuals. It apparently has not recognized that the general rules and procedures it has promulgated may actually operate to the disadvantage of minorities and women in systemic fashion. All too frequently policies established at the policy level of the Civil Service Commission do not penetrate to lower administrative levels. The result is little or no action in areas where unlawful practices are most pronounced. Civil Service selection and promotion requirements are replete with artificial selection and promotion requirements that place a premium on "paper" credentials which frequently prove of questionable value as a means of predicting actual job performance. The problem is further aggravated by the agency's use of general ability tests which are not aimed at any direct relationship to specific jobs. The inevitable consequence of this, as demonstrated by similar practices in the private sector, and, found unlawful by the Supreme Court, is that classes of persons who are culturally or educationally disadvantaged are subjected to a heavier burden in seeking employment." H.R. Rep. No. 92-238, on H.R. 1746, 92d Cong., 1st. Sess., at 24 (1971). See also, S. Rep. No. 92-415, in S. 2515, 92d Cong., 1st. Sess., at 14 (1971), cf., *Douglas* v. *Hampton*, 512 F.2d 976 (D.C. Cir. 1975).

Appendix A

4a and b. ACCEPTANCE OR REJECTION OF THE COMPLAINT (713.215)

Theoretically, the EEO officer can reject a complaint *only* for procedural deficiencies; *e.g.*, untimeliness, failure to have first submitted to counseling, etc. Actually, however, some of bases for rejecting a complaint relate to the merits. The three grounds for rejecting a complaint specified in § 713.215 are: (1) untimeliness; (2) the complaint deals with the same subject matter as an earlier complaint; and (3) the issues raised are "not within the purview" of the discrimination regulations.

a. *Timeliness* (713.214(a)(i) and (ii))

A complainant must meet two limitation periods or his complaint will be rejected as untimely by the EEO officer. *First,* it is untimely if there was no event within 30 calendar days prior to the initial contact with the counselor. *Second,* it is untimely if not filed within 15 calendar days of the date of the complainant's final interview with the counselor. Neither of these requirements is established by statute, but has been imposed by regulation. In contrast, § 2000e-5(e) imposes a 180-day period in which private and state and local employees must file a complaint with the EEOC or a state F.E.P.C. Whether a failure to meet the Part 713 time requirements would bar a Title VII action has yet to be resolved by the courts, although they generally have declined to enforce them with the same rigidity as has CSC/ARB. See, *e.g. Hunt* v. *Schlesinger,* 389 F. Supp. 725 (W.D. Tenn. 1974).

Appendix A

b. *Same Subject Matter as a Previous or Pending Complaint* (713.215)

The EEO officer must reject the allegations of a complaint "which set forth identical matters as contained in a previous complaint filed by the same complainant which is pending in the agency or has been decided by the agency." Presumably, if a complaint referred only to an event that was the subject matter of an earlier complaint it would necessarily be untimely and could be rejected on that basis. Therefore, the regulation could be read as requiring the rejection only of those allegations in the complaint (as opposed to the complaint as a whole) that relate to previously adjudicated or pending matters. On the other hand, if, for example, a complainant wishes to raise a charge of reprisal because of the filing of an earlier EEO complaint he must file a new complaint if the first complaint is on appeal to ARB, even though the second complaint would deal with matters related to a complaint already adjudicated by the agency.

c. *"Not Within Purview"* (713.215)

A significant number of complaints, or portions of complaints, are rejected as "not within the purview of § 713.212." The most important allegations so rejected are "general allegation[s] of discrimination . . . which [are] unrelated to an individual complaint of discrimination," (§ 713.212(b)), *i.e.,* class action type allegations. CSC/ARB has squarely held that:

> There is no provision in the Civil Service regulations for the processing of general allegations of discrimination within the context of individual complaints of discrimination.

Rather, such allegations have to be raised as a "third-party" complaint, under 713.251.[15]

There are three problems with the third-party complaint procedure. *First,* § 713.251 specifies that it applies only to general allegations "by organizations or other third parties" that are "unrelated to an individual complaint of discrimination." A recent memorandum explaining the third-party procedure issued by the Commission also makes it clear that a third-party complaint is not allowed if the allegations relate to the complaints of any individuals.[16] This ignores the obvious fact that in any racial discrimination case the whole point of making class allegations is that they *are* related to a particular person's individual complaints, and indeed affect all members of the discriminated-against group. See, *Sosna* v. *Iowa,* 419 U.S. 393, 413, n. 1 (White, *J.,* dissenting).

Second, the third-party allegations procedure is not adjudicatory in nature. As described in the regulation and in the recent memorandum, its purpose is simply "to call agency management's attention" to allegedly discriminatory policies. Third-party allegations are "handled solely through an agency investigation," [17] which,

[15] ARB, October 15, 1974 (*In re Williams*). There, the complainant had attempted to allege that women and minorities "as a class" were discriminated against by the agency's personnel policies pertaining to recruitment, hiring, promotions, and other aspects of employment. The allegation was rejected by the agency. See also, CRC Report at pp. 63-64; 68-69.

[16] Memorandum letter, dated January 27, 1975, from Irving Kator, Assistant Executive Director, USCSC, to Directors of Equal Employment Opportunity and Directors of Personnel.

[17] *Ibid.*

> Is not expected to cover individual cases in sufficient depth which necessarily would result in findings or decisions with respect to those individuals.[18]

There is no right to an appeal to the Civil Service Commission, rather, only a "review" can be sought. The review is not conducted by the Appeals Review Board as an adjucation of rights; rather it is handled by the regional CSC office or the CSC's Bureau of Personnel Management Evaluation. At most that review may result in a request to the agency to conduct a further investigation; there is no adjudication as such.

Third, consistent with the above, the CSC does *not* consider that the third-party allegation procedure under § 713.251 gives rise to the right to proceed in federal court under Title VII. Thus, § 713.282 provides when "an employee or applicant" will be notified of his right to file a civil action. It refers only to §§ 713.215, 713.217, 713.220, 713.221, and 713.234, viz., those sections relating to individual complaints, and excludes any reference to § 713.251. In accord with § 713.282, the Commission does not notify a third-party complainant of a right to bring action when it concludes its review under § 713.251(b). The Department of Justice has also taken the position that a third-party complaint cannot be the basis for filing a class action under Title VII.[19]

Thus, a complainant is faced with being unable to raise (or get investigated and adjudicated) class-type allega-

[18] *Ibid.*

[19] Brief for Appellees in *McLaughlin* v. *Callaway,* 5th Cir. No. 75-2261, p. 13.

tions,[20] and at the same time being relegated to a procedure that is both ineffective and irrelevant to the administrative adjudication of his complaint. Moreover, because class claims cannot be raised, complaints examiners consistently refuse to permit the introduction of evidence relating to discriminatory employment practices on the ground such evidence is not "relevant" to individual claims.[21]

Aside from the class allegation issue, the "not within purview" provision has been variously applied. Thus, for example, CSC/ARB has held that an agency correctly rejected a claim that "older blacks" had been discriminated against, since discrimination on the basis of age was not within the purview of Part 713.[22] ARB has reversed agency rejections as "not within purview" based on a finding that the complainant had not been discriminated against. Since this was in effect, a finding on the merits, the case was remanded for a hearing.[23] On the other hand, ARB has affirmed such a rejection by independently determining that since the complainant had been properly classified, he could not have been discriminated against.[24]

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[20] *Ibid.*

[21] See, e.g., ARB, No. 713-73-593. There, ARB upheld the refusal to call certain witnesses because, "they were to testify relative to the equal employment opportunity program with respect to Hispanic Americans," and such testimony was not "pertinent" to an individual claim of discrimination. See also, ARB, May 6, 1975 (*In re Williams*).

[22] ARB, No. 713-74-29.

[23] ARB, No. 713-74-402.

[24] RB071360089, Digest, 2, p. 19. This case demonstrates that the orientation of ARB personnel is towards standard personnel matters rather than discrimination. The complainant had filed an

Of great significance is whether the specific practice that harms the complainant is reviewable by the agency at all. Although § 713.212, by its terms, seems to encompass *all* discriminatory acts, in fact, it covers only those for which the agency is responsible. Thus, challenges to CSC exams, regulations, job qualifications, etc., are not within the purview of chapter 713.[25] Unfortunately, if the complainant makes a mistake on this ground, his complaint is simply rejected; it is not forwarded to the proper office (*e.g.*, the CSC if a test is at issue). By the time the complainant figures out he should be proceeding under a different part of the regulations it may be too late to file a timely complaint anywhere.[26] The explanatory materials prepared by

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EEO complaint charging the personnel officer with discrimination in refusing to reclassify his postion to a higher GS level. The agency found only that the position had been classified in accordance with the prescribed procedures, without, apparently, addressing the discrimination claim itself. ARB, on appeal, got an advisory opinion from the CSC Classification Appeals Office that there was no error in the classification. Therefore, since FPM Chapter 713 Appendix B, paragraph E-3.c(1)(b) requires proof that a *deliberate* error had been made, ARB found that the complainant was not within the purview of Part 713, and declined to accept the appeal.

[25] They must be filed under part 300 of Chapter 5, C.F.R.; see *infra*, pp. 38a-40a.

[26] There are variations on this problem. In one case a complainant filed with the CSC director of EEO claiming discrimination in the way the Federal Service Entrance Examination had been administered by the CSC. The complaint was rejected on the ground that the complainant had not sought employment with the CSC as an agency, but with the federal government generally. Therefore, the complaint was "not within purview." (Undoubtedly, if the complaint had been filed with any particular agency it would have been rejected on the ground that the agency had no authority to review actions of the CSC.) The letter decision says nothing about a Part 300 appeal or, indeed, any alternative way to get the merits of the national origin discrimination claim ad-

the CSC for dissemination to federal employees do not contain this information. See, "Fed. Facts 10", U.S. Civil Service Commission, October, 1973.

The EEO officer must also reject anything in the complaint relating to a matter not brought to the attention of the EEO counselor (713.218(a)(1)). This requirement is also rigorously applied.[26a] Finally, the officer may require that the complainant make his allegations specific rather than general on pain of having the complaint rejected. This usually entails naming an alleged discriminatory official or identifying some specific discriminatory action in contrast to alleging generally a failure to promote, etc. Again, EEOC practice, which allows the filing of the initial complaint in the most general terms, may be constrasted. See, *e.g., Oatis* v. *Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968).

4. c. and d. THE INVESTIGATION (713.216)

If the complaint is accepted, it is the EEO officer's duty to request an investigation and to handle any administrative chores necessary to ensure its being carried out. The investigator is supposed to be independent; nevertheless, in all instances he is an employee of the agency. As noted in *Morton* v. *Mancari, supra,* the House Committee report for the 1972 Amendments declared that, "the present law and the proposed statute do not permit in-

judicated administratively. (ARB No. 713-74-679). See also, ARB No. 713-74-561. The complainant charged discrimination by CSC in failing to find complainant "suitable for employment . . . with federal agencies in general, rather than with the [CSC]" as the employing agency. Therefore, the complaint was properly rejected as "not within the purview" of the regulations.

[26a] See, *e.g.*, ARB No. 713-73-540. See also, CRC Report at p. 69, and the Revised Investigator's Guidebooks, at pp. 6, 9.

dustry and labor organizations to be the judges of their own conduct in the area of employment discrimination. There is no reason why government agencies should not be treated similarly." H.R. Rep. No. 92-238, on H.R. 1746, *supra,* at 24-25.[27] Both House and Senate Committee reports criticized the resolution process as having "denied employees adequate opportunity for impartial investigation and solution of complaints" because "each agency is still responsible for investigating and judging itself." Senate Rep. No. 92-415, on S. 2515, 92d Cong., 1st Sess., at 24. See, also, CRC Report, p. 70.

As a matter of general practice, the investigation is limited as to both time and scope, despite language in the regulations that suggests the contrary.[28] Indeed, the investigator is specifically told *not* to enlarge "the scope of the investigation beyond the specific issues complained of" (Revised Investigator's Guidebook, p. 10), again in contrast to an EEOC investigation. The complainant has no control over what the investigator looks into, although he can suggest names of witnesses and is entitled to supply a detailed statement himself. The investigator must rely on local personnel for information. Statements are taken from witnesses *ex parte,* with the complainant having no right to be present or to have particular questions asked or

[27] See, Hearings on H.R. 6228 & H.R. 13517 Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 91st Cong., 1st & 2d Sess. at 112 (1970); Hearings on S. 2453, Before the Subcomm. on Labor of the Senate Committee on Labor and Public Welfare, 91st Cong., 1st Sess., at 79 (1969).

[28] For example, 5 C.F.R. § 713.216(a) requires that the investigator shall investigate the "general environment" in the "organizational segment" of the complainant. This sounds like a broad class-systemic investigation. One agency, however, interprets "organizational segment" as being limited to the immediate office in which the complainant is located (in one instance, a three-person office).

pursued. (See, Investigator's Guidebook at 23, Revised Investigator's Guidebook at 14.) Nor can he require that particular information be collected.[29] A common pattern of investigation is the taking of short affidavits from individuals containing conclusory statements as to whether the accused individual is discriminatory. In addition, very general data relating to the agency's affirmative action plan is put into the record.

After completing the investigation, the investigator submits his report (all of which must be given to the complainant within 5 days). Although the practice varies, in most agencies the investigator makes no finding as to whether there has been discrimination. He may recommend a disposition of the complaint which is not binding on either party, but forms the basis of an attempt to informally resolve the complaint.

As in the counseling stage, the proposed dispositions are usually limited in scope. Again, since back pay can *not*

[29] Thus, in a number of cases complainant's counsel have submitted to investigators interrogatories requesting information obtained as a matter of course in Title VII cases. For example:

"1. Please provide the following statistical data on the New York Regional Office of the Drug Enforcement Administration:

(a) the number of employees by race, and by job category (or description) and by General Schedule Classification, as of (i) March, 1965; (ii) March, 1966; (iii) March, 1967; (iv) March, 1968; (v) March, 1969; (vi) March, 1970; (vii) March, 1971; (viii) March, 1972; (ix) March, 1973; (x) March, 1974; (xi) March, 1975.

(b) the number of Criminal Investigators employed by the New York Regional Office, by race, as of each of the dates specified in paragraph 1(a) immediately above."

Investigators have either ignored such requests or have declined to comply on the ground the information was "irrelevant" to an individual charge of discrimination (a conclusion directly contrary to *McDonnell Douglas* v. *Green*, 411 U.S. 792 (1973)).

be given without a finding of discrimination by the national agency head (or his designee), it cannot be obtained at this stage.[30] Occasionally, a promotion is offered;[31] more typically, the proposed relief involves training or consideration "as a strong candidate" for future vacancies.[32] Despite these limitations, some attempt at conciliation is a condition to proceeding to the next step in the process.

5. Letter of Proposed Decision (713.217)

If no agreement is reached, then 20 days after the investigative report is filed, the local EEO officer sends the complainant a Notice of Proposed Disposition by the local agency head. If the complainant is satisfied, or if he does nothing, the proposed decision of the local agency head automatically becomes the final agency decision. If he is not satisfied, he is given the option of either having a hearing, or having the national agency head or his designee, usually the Director of EEO, decide the merits based on the investigative record. He is informed that regardless of the option chosen he will be able to file an action under Title VII within 30 days after the final agency decision.[33]

6. Hearing Before a Complaints Examiner (713.2(8))

If the complainant elects a hearing, a complaints examiner employed by the CSC (usually from the regional

[30] See, Notices of Proposed Disposition of Discrimination Complaint from Joseph D. Atkinson, EEO officer, to Sylvester A. Barret and Gloria A. Williams, November 27, 1974, reproduced in App. C, *infra*, pp. 86a-89a.

[31] *Ibid.*

[32] *Ibid.*

[33] See, App. B, p. 79a, *infra*.

FEAA office) is assigned.[34] The complainant is sent a letter from the designated hearing examiner informing him that within 5 days after its receipt he must supply the names of all witnesses he wishes called, and a general statement of their testimony.[35]

The complaints examiner has no power to provide for the interviewing of witnesses or to require the agency to supply documents or information before the hearing. Requests for such pre-hearing discovery are met with the response that it is solely within the agency's discretion whether to comply.[36] On the other hand, the agency, and its representative, have full access to its own records and employees in order to prepare before hand. Thus, even the complainant who is represented by counsel is at a distinct disadvantage. See, *Rich* v. *Martin Marietta*, 522 F.2d 333, 342-43 (10th Cir. 1975). The production of documents at the hearing itself is no substitute for adequate discovery prior to the hearing. In an employment discrimination case it is typically necessary to propound supplemental interrogatories or to follow up on depositions in order to ferret out all necessary information.

The procedures for the hearing itself are detailed in 5 C.F.R. § 713.218, and in the Complaints Examiner's Handbook at pp. 34, *et seq.* At the hearing, as during the investigation, the complainant has the right to have a representative: however, he has no right to have a lawyer appointed and CSC/ARB has held that the regulations do not allow

[34] See, CRC Report, p. 76, n. 259, for a description of the qualifications of Complaints Examiners. Expertise in Title VII laws or employment discrimination matters is *not* required.

[35] See, Complaints Examiners' Handbook, p. 93.

[36] See, *e.g.*, Letter of Samuel F. Vesser, Jr., Assistant Appeals Officer, CSC, to Ms. Caryl Privett, March 13, 1975, reproduced in App. C at p. 90a, *infra*.

for counsel fees to a complainant who prevails in the administrative process.[37] Thus, if the complainant cannot afford to hire an attorney, he can get counsel only if he can convince a government-employed attorney to act as his representative. Under CSC regulations, only an attorney employed by the complainant's own agency, *i.e.*, the agency charged with discrimination, can do so on official time, if such representation is not "inconsistent with the faithful performance" of the attorney's regular duties as determined *by the agency*. An attorney from another agency can act as representative only by using up annual leave or by taking a leave without pay.[38] Thus, a complainant is generally represented by a lay person. In contrast, the agency, particularly the military departments, is usually represented by counsel.[39]

The hearing is *not* an adversary proceeding, but "an extension of the investigative process." Handbook, pp. 39, 53-54. Therefore, "the concept of burden of proof does not apply." *Ibid.* Moreover, although both the agency and the complainant are responsible for furnishing all the information they *have*, neither has the burden of producing all of the evidence in support of his position. Rather, it is the

[37] ARB, November 8, 1974 (*In re Brown*).

[38] FPM Bulletin No. 713-41, October 10, 1975.

[39] See, *e.g.*, *ARB*, September 25, 1975 (*In re Howard, et al.*). There, the complainants arrived prepared to represent themselves. When they discovered that the agency (the Air Force) would be defended by a military lawyer, they protested that such a proceeding would be unfair. As ARB recited:

> The hearing was terminated when the complainants withdrew from the hearing because the agency was represented by an attorney. They requested that the agency furnish them with an attorney but were told that there was no provision for legal aid. *Id.*, at p. 2.

responsibility of the examiner to elicit testimony and to obtain witnesses or evidence that are needed. *Id.*, at pp. 39-40, 55-57. Even though the complainant presents his case first, he is not "required to prove discrimination." *Id.* at 56.

Although this procedure *sounds* good, in operation its non-adversarial nature works to the complainant's disadvantage. The fact of the matter is that if it is not proven; (1) that there was discrimination; (2) that the complainant was the victim of it; and (3) that it is "clear" that "but for" the discrimination he would have been given the job in question, then the complainant will lose. Thus, if he relies on the apparent duty of the complaints examiner to develop all the relevant proof, when he gets the decision of the agency and ARB he will discover that he indeed had a burden of proof after all. The decisions of ARB in particular are replete with comments on failure to prove discrimination or deficiencies in the record that result in the rejection of the complainant's claims.[40]

The complaints examiner has wide latitude in deciding what evidence is admissible. Although some of the rules of evidence, particularly regarding the admissibility of hearsay in the form of affidavits, are not strictly applied, the standard of relevance is in fact narrower than in Title VII court actions. This is most noticeably the case regarding evidence of patterns of class discrimination; it is typically excluded, and the exclusion is upheld on the ground that the examiner has "the duty of conducting the hearing in such a way as to adduce evidence pertinent to the complaint, and to exclude testimony or information which is

[40] See, e.g., ARB, October 4, 1974 (*In re Jones*), reproduced in App. C, pp. 82a-85a, *infra*.

not pertinent."[41] In practice, this means that it is "assumed" that all pertinent evidence is in the Investigator's report, and that the exclusion of evidence is justified.[42]

Following the hearing, the examiner makes a recommended decision to the agency head. As with the former regulations, "the conclusions and findings of the examiner are in the nature of recommendations to the agency head who makes the final agency determination as to whether discrimination exists." H.R. Rep. No. 92-238, on H.R. 1746, *supra*, at 24; Senate Rep. No. 92-415, on S. 2515, *supra*, at 14. The complainant does *not* have the right to see, review or comment on the examiner's recommendation or to see the transcript prior to the final agency decision. See, Handbook, p. 79; §§ 713.218(g) and 713.221(b)(2). Thus, he has no opportunity to influence the agency decision, or to file a memorandum based on a review of the transcript of testimony. This is in contrast to, *e.g.*, the opportunity to comment on or object to a master's report prior to a district court's decision under F.R. Civ. Proc., Rule 53(e)(2). *Cf.*, 42 U.S.C. § 2000e-5(f)(5).

7. Final Agency Decision (713.221)

Most agencies have delegated responsibility for making the decision to a director of EEO. If the agency decides *not* to adopt the examiner's recommended decision the regulations state that reasons for the rejection are to be given (5 C.F.R., § 713.221(b)(2)). Unfortunately, this provision was rendered ineffective by the Civil Service Commission itself when it held that as long as CSC/ARB gave reasons why a decision was made, the agency need not do

[41] ARB, 713-73-593, at p. 3.

[42] *Ibid.*

so.[43] In a significant number of instances proposed decisions finding discrimination are not followed by agencies.[44] Based on the report of the hearing (or on the investigative file if the complainant has chosen not to have a hearing) the national department or agency head, or his designee, makes a decision (5 C.F.R. § 713.221). The decision is to require remedial or corrective action if necessary. The complainant must be sent a copy of the report of the examiner and the hearing record, along with the agency decision.

8.-10. Appeal to CSC/ARB (713.231-713.234)

The complainant is informed of his right either to appeal to CSC/ARB within 15 days or to file an action in federal court within 30. If the former option is chosen, a new 180-day period commences. The decision of CSC/ARB is final[45] and a civil action must be filed within 30 days of receipt of notice thereof. During consideration of

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[43] This ruling was handed down by the CSC in three cases (including one now before this Court *sub nom., Salone* v. *United States*, No. 74-1600), in which the Commission declined to reopen and review an ARB decision. The Commission's general counsel had requested reopenings on the ground the agencies had not given reasons for not following the recommended decisions of the complaints examiners. The Commission declined to reopen because ARB had detailed reasons for the final decision rendered. (Minutes of U.S.C.S.C., Feb. 27, 1974). The problem with this result is that there is no reason for the agency to give reasons, since if an appeal is taken to ARB, that body will detail reasons.

[44] In Fiscal Year 1974, agencies reversed 29 out of 109 Examiner's findings of discrimination (26.6%). In contrast, they reversed only 7 out of 534 findings of *no* discrimination (1.3%).

[45] Except that the Commission itself has the discretion to reopen under § 713.235. See, *supra*, pp. 3a-4a. Such reopenings may be on the initiative of the Commission, the agency, or the complainant.

the 1972 Amendments, Congress expressly stated that, "The system which permits the Civil Service Commission to sit in judgment over its own practices and procedures which themselves may raise questions of systemic discrimination, creates a built-in conflict-of-interest." H.R. Rep. No. 92-238, on H.R. 1746, *supra* at 24.

Congress also criticized ARB because it "rarely reverses the agency decision" on discrimination (*Ibid*). This is still the case. The government's own statistics show that in the first three fiscal years since § 2000e-16 went into effect (July 1, 1972 to June 30, 1975), ARB decided 1,354 EEO appeals on the merits.[46] It reversed agency findings of no discrimination in only 45 cases, or 3.32%. In other words, ARB *itself* found discrimination only in those 45 instances.[47] Even if the appeals where ARB ordered further corrective action without disturbing the agency finding as to discrimination are included, complainants received favorable ARB dispositions on other than procedural issues in only 137 out of a total of 1,389 appeals, less than 10% of the cases.[48]

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[46] See App. C, p. 53a, Brief for Respondents in *Brown* v. *G.S.A.*, No. 74-768. The figure of 1,354 is arrived at by totalling for the three fiscal years the appeals in the categories, "Affirmed—Agency found no discrimination"; "Affirmed—Agency found no discrimination (but further corrective action recommended by ARB"; "Reversed—Agency found no discrimination." The other categories involve either procedural questions (i.e., untimeliness), or appeals where the agency itself had found discrimination so that that question was not at issue. But see, text at n. 48, *infra*.

[47] Two of *those* cases were reopened and vacated by the Commission under § 713.251.

[48] The total figure was arrived at by adding in the totals for the categories: "Affirmed—Agency found discrimination"; and "Affirmed—Agency found discrimination (further corrective action recommended by ARB)." The figure 137 was arrived at by adding

Appendix A

CORRECTIVE AND REMEDIAL ACTION (713.271)

Either the agency or the CSC can order certain specified corrective or remedial action as specified in § 713.271. Corrective action is ordered in a significant number of cases even though discrimination is *not* found. The reason for this may be that if there is no finding of discrimination then no back pay can be awarded. Thus, both agencies and the CSC give some future relief but avoid expending government funds.

Even if discrimination is found, back pay cannot be granted unless it is shown that a promotion would have been given "but for" the discrimination, a rule directly contrary to that applied by courts in Title VII actions (see the discussion in the Brief, *supra*). This rule is rigorously applied and awards of back pay government-wide have been rare indeed. Thus, in fiscal year 1974, only 40 federal employees received back pay[49] as a result of agency action. This is in dramatic contrast to the private sector, where the EEOC, without the plenary power that federal agencies or the CSC have over federal employment, obtained in the same fiscal year back pay for 49,388 employees in the amount of $56,266,827 through conciliation.[50]

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to the 45 cases where ARB itself actually found discrimination, those cases where it affirmed agency findings of discrimination or where, although it affirmed findings of *no* discrimination, it ordered further corrective action.

[49] Brief for Respondents, *Brown* v. *G.S.A.*, p. 49, n. 28; which states that back pay was granted in only 4 per cent of the 985 agency dispositions on the merits.

[50] Letter from Marty Rogers, Special Assistant to the Executive Director of EEOC to Eric Schnapper, Esq., November 21, 1975. In FY 1975 EEOC obtained $109,669,285 in back pay for 51,216 employees (see, App. C, p. 91a).

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Since a complainant cannot prosecute his complaint on behalf of a class, such relief as there is is limited to his individual problem. Thus, in a case where discrimination against black civilian employees generally at a major installation was shown, the Air Force granted only very limited relief. An appeal was taken to ARB requesting that broad class relief of the kind given in private Title VII cases be afforded.[51] ARB held that it could not give relief other than that specified in § 713.271(b).[52] Therefore, the appeal was denied.[53] Finally, the third-party complaint provision states that the Commission may order back pay if it finds discrimination (§ 713.251(c)). *Amicus* has received from the Commission copies of all final third-party orders; back pay has *never* been ordered either for an individual or for a class.

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[51] The requested relief included class-wide back pay, upgrading of blacks to proper seniority levels, appointment of blacks to supervisory positions, a revision of the rating and supervisory assessment system to eliminate discriminatory factors, costs and attorneys' fees.

[52] That is, individual relief limited to: retroactive promotion or back pay subject to the "but for" rule; priority consideration for a promotion; cancellation of an unwarranted personnel or disciplinary action; and full opportunity to participate in benefits that had been denied him.

[53] ARB, September 25, 1975 (*In re Howard, et al.*). See also, *e.g.*, ARB No. 713-74-203 (relief to women generally *cannot* be given even where there is proof of class discrimination); ARB, May 6, 1975 *(In re Williams)* (ARB noted complete absence of blacks in position in question, but only suggested that the "agency might consider the possibility" of instituting an affirmative action program); ARB No. 713-74-577 (Complaints Examiner should not order class relief in an individual case; see Handbook, pp. 73-74.)

Appendix A

D. *Other C.S.C. Procedures*

1. Charges of Reprisal

The regulations (5 C.F.R. § 713.261-713.262) provide two procedures to make a charge that a complainant has suffered reprisal because he has filed an EEO complaint. He can file a *complaint* of reprisal making the allegation and have it processed under the procedures described above (§ 713.262(a)), or he can file a charge of reprisal under the provisions of § 713.262(b). This section purports to furnish an expedited procedure by which immediate relief can be obtained if there is a reprisal. The charge must be filed with the agency head or EEO officer within 15 days after the act of reprisal. Within 15 days the agency is to send the CSC a copy of the charge and a report of the action taken in response. If the agency has not acted within 15 days, or if adequate corrective action has not been taken, the complainant may submit a statement to the CSC, which can make the agency take appropriate action.

The effectiveness of this procedure is yet to be demonstrated. The CSC (through the office of the Director of Equal Employment Opportunity) has taken the position that the procedure is not intended to allow interference with normal personnel actions. This translates to mean that if, e.g., an employee is fired after filing a complaint, the CSC will take the agency's word that the firing was done in the normal course of business, will not interfere, and will require the employee to pursue the regular adverse action appeal procedures.

2. Adverse Action Appeals

If a federal employee has been fired, suspended, or has had some other adverse action taken against him, he is

Appendix A

entitled to an appeal under 5 C.F.R. Part 772. The appeal is to the Federal Employees Appeals Agency at the regional CSC office. There is then a right to petition the Appeals Review Board of the CSC, which has discretion as to whether or not it will hear the case.[54]

Section 772.306 provides that if an employee makes an allegation that an adverse action was based in whole or in part on discrimination, he shall be given the option either to have that complaint processed under Part 713, or to have the allegation adjudicated by the FEAA as part of the appeals process. In either case, an investigation is held by the agency pursuant to 5 C.F.R. 713.216, but the initial decision on the discrimination claim is made either by the local agency or by the FEAA appeals examiner, depending on which route is taken. If the FEAA route is taken one of the procedural steps is shortcutted. There is still a hearing on the discrimination complaint, but the hearing occurs without a local agency proposed decision (*i.e.*, step 5 on the flow chart is omitted), and there is no final decision by the national agency head.

There are two problems with the FEAA option. *First*, if the adverse action is reversed because the agency failed to comply with procedural requirements (a common result), the discrimination claim will not be reached. *Second*, the regulations do not provide that a complainant electing to proceed under Part 772 will be told of his right to sue

[54] The system was extensively revised in July, 1974. Prior to the revision, an employee had the option of a hearing by the agency, with review by the C.S.C., or a hearing by a C.S.C. appeals examiner, with review by the C.S.C. This option has been eliminated, and a one-step review procedure substituted. Part 771, provides procedures by which an employee may present any grievance (*i.e.*, "any matter of concern or dissatisfaction"), to an agency for resolution, and Section 771.109 provides that any allegation of discrimination made in connection with a grievance shall be processed under Part 713. 5 C.F.R. 713.219 was appropriately amended.

under Title VII, and in fact he is not even if the merits of his EEO claim are reached.

3. Probationary Employees

If a non-tenured federal employee is separated at the end of his probationary period for "failure to make satisfactory progress in training," he can appeal on the ground of discrimination under Part 315 of 5 C.F.R., or file a 713 complaint.[55] If he goes the 315 route, the appeal is to the regional FEAA of the CSC. The FEAA requires the local agency head to conduct an investigation pursuant to Part 713 and send the investigative report to the FEAA. The employee is given an opportunity to review and comment upon the investigative report within 10 days, but there is no hearing. After the FEAA decision, there is an appeal to CSC/ARB pursuant to 5 C.F.R. 772.310. Neither FEAA nor CSC/ARB informs the employee of his right to sue under Title VII.[56]

4. Challenges to Job Qualifications

There are three different sources for job qualifications such as tests, educational requirements, etc., that may give rise to discrimination charges:

1. The Agency;
2. The CSC (*e.g.*, CSC examinations);
3. Statute (*e.g.*, Veterans Preference)

[55] The only other grounds for appeal are that the termination was based on partisan political reasons, marital status, or physical handicap.

[56] See, *e.g.*, ARB, October 31, 1975 *(In re Harris)*. The *Harris* case again demonstrates the orientation of the process towards ordinary personnel issues, and the limited nature of the inquiry. ARB held that it could not "review . . . the sufficiency of the reasons for termination. . . ." Thus, it failed to inquire whether the reason given for the dismissal of the complainant were pretextual (within the meaning of *McDonnell Douglas* v. *Green*), and essentially accepted those reasons at face value.

If a complainant challenges an *agency* imposed job qualification, he simply files a complaint under Part 713 and it is processed accordingly.

If he seeks to challenge a CSC imposed requirement, he cannot file under Part 713, since an agency has no power to alter a CSC rule. He must file an appeal under 5 C.F.R. Part 300, especially §§ 300.102-104.[57] The appeal must be filed within 15 days of the date of application of the employment or the date the complainant became aware of the results of the application of the practice. Thus, if an

[57] 5 C.F.R. § 300.103(b) and (c).

(b) Relevance. (1) There shall be a rational relationship between performance in the position to be filled (or in the target position in the case of an entry position) and the employment practice used. The demonstration of rational relationship shall include a showing that the employment practice was professionally developed. A minimum educational requirement may not be established except as authorized under section 3308 of title 5, United States Code.

(2) In the case of an entry position the required relevance may be based upon the target position when—

(i) The entry position is a training position or the first of a progressive series of established training and development positions leading to a target at a higher level; and

(ii) New employees, within a reasonable period of time and in the great majority of cases, can expect to progress to a target position at a higher level.

(c) Equal employment opportunity. An employment practice shall not discriminate on the basis of race, color, religion, sex, national origin, partisan political affiliation, or other nonmerit factor. This requirement is generally met when an employment practice is relevant to performance in the position to be filled (or in the target position in the case of an entry position).

5 C.F.R. §300.104:

(a) *Employment practices.* (1) A candidate who believes that an employment practice which was applied to him and which is administered or required by the Commission violates

employee goes to an EEO counselor within the thirty days provided by Part 713 on the assumption that that is the proper procedure, he will be too late to proceed under Part 300. See text at n. 26, *supra*. The appeal must set forth the basis of the complainant's belief that the employment practice discriminates against him. The regulations do not provide for an investigation; however, the appeal is processed under the provisions of Part 772, Subpart D and therefore the Appeals Review Board will provide the option of having the case decided on the record or having a hearing before a member of the Board or an appeals officer (5 C.F.R. § 772.403).

The third category of job qualifications are those set by statute. The CSC has held that challenges to such qualifications are not within the purview of the regulations, since the CSC has no power to alter them.

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a basic requirement in section 300.103 is entitled to appeal to the Commission.

(2) An appeal shall be in writing, shall set forth the basis for the candidate's belief that a violation occurred, and shall be filed with the Board of Appeals and Review, U.S. Civil Service Commission, Washington, D.C. 20415, no later than 15 days from the date the employment practice was applied to the candidate or the date he became aware of the results of the application of the employment practice. The board may extend the time limit in this subparagraph for good cause shown by the candidate.

(3) An appeal shall be processed in accordance with subpart D of part 772 of this chapter.

• • •

(c) *Complaints and grievances to an agency.*

(1) A candidate may file a complaint with an agency when he believes that an employment practice which was applied to him and which is administered or required by the agency discriminates against him on the basis of race, color, religion, sex, or national origin. The complaint shall be filed and processed in accordance with subpart B of Part 713 of this chapter.

APPENDIX B

Federal Personnel Manual Letter No. 713-17

PUBLISHED IN ADVANCE OF INCORPORATION
IN FPM CHAPTER 713&FPM Supp. 990-1
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FPM LTR. NO. 713-17

UNITED STATES CIVIL SERVICE COMMISSION

FEDERAL PERSONNEL MANUAL SYSTEM

LETTER

Washington, D.C. 20415
November 3, 1972

FPM LETTER NO. 713-17

SUBJECT: Revisions in Equal Opportunity Regulations (Part 713)

Heads of Departments and Independent Establishments:

The purpose of this Letter is to provide a summary of the major revisions to the Equal Opportunity regulations (part 713) and to transmit the revised regulations as well as to prescribe certain actions to be taken by agencies in connection with these changes.

The regulatory changes have been made to implement the Equal Employment Opportunity Act of 1972 (P. L. 92-261), and to strengthen the system of discrimination complaint processing. They are designed to assure employees and applicants of their right to fair and fast adjudication of discrimination complaints and to assure that agencies move affirmatively in accordance with the law in effecting equal employment opportunity for all persons.

In accordance with the requirements of P. L. 92-261 regarding consultation with interested groups, the revised regulations were adopted after consultation with representatives of civil rights organizations, women's groups, labor organizations and Federal agencies.

SIGNIFICANT CHANGES ADOPTED

The following is a summary of the major changes in the regulations:

- To emphasize the affirmative aspects of agency equal employment opportunity obligations, the requirements for submission of national and regional EEO plans and the responsibility of agency heads to assure that principal and operating EEO officials meet qualification requirements are stated. (Sections 713.203; 713.203(e); and 713.204(d)(1))

- Agencies are required to designate a Federal Women's Program Coordinator with responsibility for advising the Director of EEO on matters affecting the employment and advancement of women. (Section 713.204(c))

INQUIRIES: Office of Federal Equal Employment Opportunity (Code 101-27642 or 24420, or 632-7642 or 4420

CSC CODE 713, Equal Employment Opportunity

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- Agencies are required to publicize and post permanently on bulletin boards the names and addresses of various EEO officials. (Section 713.204(f))

- Agencies are required to make reasonable accommodation to the religious needs of applicants and employees (including those who observe the Sabbath on other than Sunday) when the accommodation can be made by a substitution of a qualified employee, a grant of leave, or other means without undue hardship on the business of the agency. The agency has an affirmative duty to attempt to accommodate and if a complaint arises in this connection, the agency has the duty to demonstrate its inability to accommodate. (Section 713.204(g))

- The time limit for contacting an EEO Counselor is extended from 15 to 30 calendar days from the date of the alleged discriminatory act (Section 713.214(a)(1)(i)) and agencies are required to assure that full cooperation is provided the counselor by all employees in the performance of his duties (Section 713.213(b))

- In addition to the EEO Officer, the officials designated to receive a complaint include the head of the agency, the Director of EEO, the head of a field establishment, a Federal Women's Program Coordinator and any other officials designated for this purpose by the agency. (Section 713.214(a)(2))

- Counselors are prohibited from attempting in any way to restrain a person from filing a complaint of discrimination. Counselors may not advise a person not to file a complaint. (Section 713.213.(a))

- The time limit for completion of counseling has been converted from 15 work days to 21 calendar days for consistency with other time limits which are stated in calendar days. (Section 713.213(a))

- If the final counseling interview is not completed in 21 days, the counselor must on the 21st day notify the person counseled of his right to file a complaint at any time thereafter and up to 15 days after the final interview has been conducted. (Section 713.213(a))

- If after investigation of the complaint an adjustment is not arrived at, the complainant is allowed 15 days instead of seven from the date of receipt of the proposed disposition to request a hearing. The complainant's request must be in writing. (Section 713.217(b))

- When there is a finding of discrimination, agencies must take remedial action, with or without back pay, as appropriate, and must review the case to determine if disciplinary action should be taken and record the basis for the decision to take or not to take disciplinary action. (Section 713.221(c))

- Where an action otherwise appealable to the Commission involves a discrimination issue, the agency must inform the employee of his right to elect to proceed under this part.. (Section 713.236)

- A complaint is deemed filed (for the purpose of determining the running of time limits) on the date it is delivered to an agency official designated to receive complaint or, if mailed to such officials, on the postmark date. (Section 713.214(a)(3))

- Agencies are required to acknowledge receipt of complaints in writing and in the acknowledgement notice advise the complainant of all his rights, including appeal to the Commission and right to file a civil action. (Section 713.214(a)(3))

- Expedited procedures are provided for action on complaints of coercion or reprisal by a complainant, his representative, or by a witness. Allegations may be handled during the hearing on the original complaint, or, if a charge arises before a hearing, agencies will be required to investigate and report to the Commission on actions taken on the charge within 15 days of receipt of the charge. (Section 713.262)

- Agencies are required to furnish the investigative file promptly to the complainant and provide him an opportunity to discuss the file with appropriate officials. (Section 713.217(a))

- Complaints must be resolved within 180 days of filing. Agencies are required to report monthly to the Commission on pending complaints. If a decision on the complaint has not been made within 75 days of filing and the Commission has not been requested to supply a complaints examiner within that period of time, the agency will be required to take whatever measures the Commission considers appropriate to expedite processing or the Commission may assume responsibility for processing the complaint, including making the investigation (on a reimbursable basis) and requiring the agency to propose a disposition to the complainant within 15 days of receipt of the investigator's report. (Section 713.220(e))

- A recommendation for a finding of discrimination by a Complaints Examiner will become a final decision of discrimination binding on the agency 30 days after the recommendation is made, where the agency has failed to issue a final decision within 180 days of filing of the complaint. (Section 713.220(d))

- Remedial action on behalf of applicants or employees in cases where there is a finding of discrimination must be taken by the agency. If an applicant has been denied employment because of

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discrimination. the agency shall offer him employment and the title and grade denied him. Appointment shall be retroactive to the date the applicant would have been hired. Back pay shall be awarded from the beginning of the retroactive period. Both the appointment and the back pay may not extend from a date earlier than 2 years prior to the date the complaint was initially filed.

Similar action (including back pay) shall be taken when it is determined that an employee was discriminated against and it is reasonable to believe that he was denied a promotion, or other employment benefit. Back pay liability where there is a retroactive promotion is limited to two years prior to the date the complaint was filed but in any event not to exceed the date the complainant would have been promoted.

Findings of discrimination involving awards of back pay and retroactive appointments or promotions may be made by the agency or by the Commission on their own motion and not based on complaints. In such event, the period of retroactivity may extend up to two years prior to the date the finding of discrimination was recorded, but in the case of a retroactive promotion not to exceed the date the employee would have been promoted absent the discrimination.

Where there is a finding of discrimination and it is not clear that except for the discrimination the complainant would have been promoted, he must be given consideration for promotion to a position for which he is qualified before consideration is given to other candidates and if not selected, the agency must record the reasons for such nonselection. Similar priority consideration must be given to an applicant where there is finding of discrimination but no reasonable certainty that the complainant would have been hired. (Section 713.271)

- Complainants must be notified of their rights under the complaint procedures and the time limits applicable thereto including the right to file a civil action in an appropriate U.S. District Court. (Section 713.281)

  Notice of right to file a complaint must be provided by the Counselor; the receipt of the complaint must be acknowledged by the Director of EEO or EEO Officer and the complainant advised of his administrative rights and right to file a civil action; and the decision letter on a complaint must inform the complainant of his right to appeal to the Commission and to file a civil action in an appropriate U.S. District Court. (Sections 713.213(a); 713.214(a)(3); 713.215; 713.217(c); 713.220(d); and 713.221(d))

- Complaints by third parties or organizations must be investigated by the agency and the agency must prepare a file reflecting the results of the investigation and make the file available to the complaining parties along with its decision on the complaint. Within 30 days, the complaining party may request that the decision be reviewed by the Commission which may require additional investigation by the agency or make its own investigation and order such corrective action, including back pay, as it deems appropriate. (Section 713.251)

- Officials conducting discrimination complaint hearings are referred to as "Complaint Examiners" in lieu of "Appeal Examiners". In addition to present authority, they are also authorized to require the appearance of an employee of any Federal agency if he has information pertinent to the complaint under consideration. (Section 713.218(c))

EFFECTIVE DATES

With the exception of section 713.271, the regulation changes become effective December 1, 1972. Section 713.271 dealing with remedial action, including back pay, is retroactive to March 24, 1972, the effective date of enactment of The Equal Employment Opportunity Act of 1972.

ACTIONS REQUIRED BY AGENCIES

Agencies must take certain actions prior to the effective date of the regulations to assure employees of their rights under the regulations:

1. All persons responsible for the administration of the equal employment opportunity program must be advised as quickly as possible of the changes in the regulations and the way in which the changes affect their responsibilities. Directors of Equal Employment Opportunity, Equal Employment Opportunity Officers, Federal Women Coordinators and other officials have new or changed responsibilities as explained in the regulation changes noted above and they must be informed of these responsibilities.

2. All final decisions made on or after March 24, 1972, which involved a finding of discrimination must be reviewed to determine if back pay or retroactive promotion or appointment is in order; if so, such action should be taken. Section 713.271 of the regulations should be cited as authority for the action.

3. Officials authorized to receive complaints must be advised to forward complaints immediately upon receipt to the Director of Equal Employment Opportunity or an Equal Employment Opportunity Official so there will be no delay in undertaking processing of complaint. The Director of Equal Employment Opportunity or appropriate Equal Employment Opportunity Official will order the investigation.

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4. Take all feasible steps to publicize the following information:

   - The names and addresses of the Director of Equal Employment Opportunity, the Federal Women's Program Coordinators, and the appropriate EEO Officer and Counselors.

   - The time requirements for contacting an EEO Counselor.

   This information must be posted permanently on official bulletin boards but other means, such as employee bulletins and letters, should be used to make sure employees know who to contact in connection with a complaint of discrimination and the time limits for contacting a counselor.

5. Prepare required notices to complainants and distribute them to appropriate officials for their use in discrimination complaint processing. (See samples attached.)

6. Undertake any training programs necessary to acquaint counselors and other EEO officials of their responsibilities under the revised regulations. Commission training programs in Washington and in the field will be available to assist agencies in this regard.

7. Review the agency's entire complaint processing system and make necessary changes to assure that all complainants will receive a final decision within 180 days of filing.

8. Take special measures immediately to make a final agency decision in all discrimination complaint cases pending over 180 days.

By direction of the Commission:

Bernard Rosen
Executive Director

Attachment
1. Regulations
2-6 Sample notices

Attachment 1 to FPM Ltr. 713-17

Part 713 -- EQUAL OPPORTUNITY

(Present regulations are shown in right-hand column -- deleted material is bracketed; added material is shown in left-hand column)

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SUBPART B. EQUAL OPPORTUNITY WITHOUT REGARD TO RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

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713.401 Equal opportunity without regard to politics, marital status, or physical handicap

AUTHORITY: The provisions of this part 713 issued under 5 U.S.C. 1301, 3301, 3302, 7151-7154, 7301; E.O. 10577; 3 CFR, 1954-1958 Comp., p. 218, E.O. 11222, 3 CFR 1964-1965 Comp., p. 306, E.O. 11478, 3 CFR 1969 Comp.)

; 86 Stat. 111;

SUBPART A. [RESERVED]

SUBPART B. EQUAL OPPORTUNITY WITHOUT REGARD TO RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

General Provisions

Sec. 713.201 **Purpose and applicability.** (a) *Purpose.* This subpart sets forth the regulations under which an agency shall establish a continuing affirmative program for equal opportunity in employment and personnel operations without regard to race, color, religion, sex, or national origin and under which the Commission will review an agency's program and entertain an appeal from a person dissatisfied with an agency's [processing of] his complaint of discrimination on grounds of race, color, religion, sex, or national origin.

decision or other final action on

(b) *Applicability.* (1) This subpart applies (i) to military department as defined in section 102 of title 5, United States Code, executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code, →the United States Postal Service, and the Postal Rate Commission,← and to the employees thereof, including employees paid from nonappropriated funds, and (ii) to those portions of the legislative and judicial branches of the Federal Government and the government of the District of Columbia having positions in the competitive service and to the employees in those positions.

(2) This subpart does not apply to aliens employed outside the limits of the United States.

Sec. 713.202 **General policy.** It is the policy of the Government of the United States and of the government of the District of Columbia to provide equal opportunity in employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, or national origin, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each agency.

Sec. 713.203 **Agency program.** The head of each agency shall exercise personal leadership in establishing, maintaining, and carrying out a continuing affirmative program designed to promote equal opportunity in every aspect of agency personnel policy and practice in the employment, development, advancement, and treatment of employees. Under the terms of its program, an agency shall[to the maximum extent possible]:

and assure that the principal and operating officials responsible for carrying out the equal employment opportunity program meet established qualifications requirements

(a) Provide sufficient resources to administer its equal employment opportunity program in a positive and effective manner;

(b) Conduct a continuing campaign to eradicate every form of prejudice or discrimination based upon race, color, religion, sex, or national origin, from the agency's personnel policies and practices and working conditions, including disciplinary action against employees who engage in discriminatory practices;

(c) Utilize to the fullest extent the present skills of employees by all means, including the redesigning of jobs where feasible so that tasks not requiring the full utilization of skills of incumbents are concentrated in jobs with lower skill requirements;

(d) Provide the maximum feasible opportunity to employees to enhance their skills through on-the-job training, work-study programs, and other training measures so that they may perform at their highest potential and advance in accordance with their abilities;

(e) Communicate the agency's equal employment opportunity policy and program and its employment needs to all sources of job candidates without regard to race, color, religion, sex, or national origin, and solicit their recruitment assistance on a continuing basis;

(f) Participate at the community level with other employers, with schools and universities, and with other public and private groups in cooperative action to improve employment opportunities and community conditions that affect employability;

(g) Review, evaluate, and control managerial and supervisory performance in such a manner as to insure a continuing affirmative application and vigorous enforcement of the policy of equal opportunity, and provide orientation, training, and advice to managers and supervisors to assure their understanding and implementation of the equal employment opportunity policy and program;

(h) Provide recognition to employees, supervisors, managers, and units demonstrating superior accomplishment in equal employment opportunity;

labor — (i) Inform its employees and recognized employee organizations of the affirmative equal employment opportunity policy and program and enlist their cooperation;

(j) Provide for counseling employees and applicants who believe they have been discriminated against because of race, color, religion, sex, or national origin and for resolving informally the matters raised by them;

(k) Provide for the prompt, fair, and impartial consideration and disposition of complaints involving issues of discrimination on grounds of race, color, religion, sex, or national origin; and

(l) Establish a system for periodically evaluating the effectiveness of the agency's overall equal employment opportunity effort.

Sec. 713.204 Implementation of agency program. To implement the program established under this subpart, an agency shall:

(a) Develop the plans, procedures, and regulations necessary to carry out its program established under this subpart;

(b) Appraise its personnel operations at regular intervals to assure their conformity with the policy in section 713.202 and its program established in accordance with section 713.203;

as many — (c) Designate a Director of Equal Employment Opportunity [and such] Equal Employment Opportunity Officers [and] Equal Employment Opportunity Counselors, as may be necessary, to assist the head of the agency to carry out the functions described in this sub-

Federal Women's Program Coordinators, and other persons

part in all organizational units and locations of the agency. The functioning of the Director of Equal Employment Opportunity, the Equal Employment Opportunity Officer, and the Equal Employment Opportunity Counselor shall be subject to review by the Commission. The Director of Equal Employment Opportunity shall be under the immediate supervision of the head of his agency, and shall be given the authority necessary to enable him to carry out his responsibilities under the regulations in this subpart;

and the qualifications of the persons so designated

(d) Assign to the Director of Equal Employment Opportunity the functions of:

(1) Advising the head of his agency with respect to the preparation of plans, procedures, regulations, reports, and other matters pertaining to the policy in section 713.202 and the agency program required to be established under section 713.203;

national and regional equal employment opportunity

(2) Evaluating from time to time the sufficiency of the total agency program for equal employment opportunity and reporting thereon to the head of the agency with recommendations as to any improvement or correction needed, including remedial or disciplinary action with respect to managerial or supervisory employees who have failed in their responsibilities;

(3) When authorized by the head of the agency, making changes in programs and procedures designed to eliminate discriminatory practices and improve the agency's program for equal employment opportunity;

(4) Providing for counseling, by an Equal Employment Opportunity Counselor, of any aggrieved employee or applicant for employment who believes that he has been discriminated against because of race, color, religion, sex, or national origin and for attempting to resolve on an informal basis the matter raised by the employee or applicant before a complaint of discrimination may be filed under section 713.214;

(5) Providing for the receipt and investigation of individual [complaints] of discrimination in personnel matters within the agency, subject to sections 713.211 through 713.222;

complaints

(6) Providing for the receipt, investigation, and disposition of general allegations by organizations or other third parties of discrimination in personnel matters within the agency [which] are unrelated to an individual complaint of discrimination subject to sections 713.211 through 713.222, under procedures determined by the agency to be appropriate, with notification of decision to the party submitting the allegation.]

subject to section 713.251;

(7) When authorized by the head of the agency, making the decision under section 713.221 for the head of the agency on complaints of discrimination and ordering such corrective measures as he may consider necessary, including the recommendation for such disciplinary action as is warranted by the circumstances when an employee has been found to have engaged in a discriminatory practice; and

(8) When not authorized to make the decision for the head of the agency on complaints of discrimination, reviewing, at his discretion, the record on any complaint before the decision is made under section 713.221 and making such recommendations to the head of the agency or his designee as he considers desirable, including the recommendation for such disciplinary action as is warranted by the circumstances when an employee is found to have engaged in a discriminatory practice;

(e) Insure that equal opportunity for women is an integral part of the agency's overall program by assigning to the Federal Women's Program Coordinators the function of advising the Director of Equal Employment Opportunity on matters affecting the employment and advancement of women;

(f) Publicize to its employees and post permanently on official bulletin boards:

(1) The names and addresses of the Director of Equal Employment Opportunity and the Federal Women's Program Coordinators;

(2) The name and address of the appropriate Equal Employment Opportunity Officer;

[(e) Publicize to its employees:
(1) The name and address of the Director of Equal Employment Opportunity;
(2) Where appropriate, the name and address of an Equal Opportunity Officer; and]

(3) The name and address of the Equal Employment Opportunity Counselor and the organizational units he serves; his availability to counsel an employee or [qualified] applicant for employment who believes that he has been discriminated against because of race, color, religion, sex, or national origin; and the requirement that an employee or [qualified] applicant for employment must consult the Counselor as provided by section 713.213 about his allegation of discrimination because of race, color, religion, sex, or national origin before a complaint as provided by section 713.214 may be filed;

and

(4) Time limits for contacting an Equal Employment Opportunity Counselor;

(g)

(by substitution of another qualified employee, hardship on

If an agency cannot accommodate an employee or applicant, it has a duty in a complaint arising under this subpart to demonstrate its inability to do so;

(h)

; and

(i) Submit annually for the review and approval of the Commission written national and regional equal employment opportunity plans of action. Plans shall be submitted in a format prescribed by the Commission and shall include, but not be limited to --

(1) Provision for the establishment of training and education programs designed to provide maximum opportunity for employees to advance so as to perform at their highest potential;

(2) Description of the qualifications, in terms of training and experience relating to equal employment opportunity, of the principal and operating officials concerned with administration of the agency's equal employment opportunity program; and

(3) Description of the allocation of personnel and resources proposed by the agency to carry out its equal employment opportunity program.

The head of each department and agency shall comply with the rules, regulations, orders, and instructions issued by the Commission.

[(f) Make reasonable accommodations to the religious needs of applicants and employees, including the needs of those who observe the Sabbath on other than Sunday, when those accommodations can be made (by a grant of leave, a change of a tour of duty, or other means) without undue interference with the business of the agency or with the rights of other applicants or employees; and

(g) Make readily available to its employees a copy of its regulations issued to carry out its program of equal employment opportunity.]

Sec. 713.205 **Commission review and evaluation of agency program operations.** The Commission shall review and evaluate agency program operations periodically, obtain such reports as it deems necessary, and report to the President as appropriate on overall progress. When it finds that an agency's program operations are not in conformity with the policy set forth in section 713.202 and the regulations in this subpart, the Commission shall require improvement or corrective action to bring the agency's program operations into conformity with this policy and the regulations in this subpart.

Agency Regulations for Processing Complaints of Discrimination

Sec. 713.211 **General.** An agency shall ensure that its regulations governing the processing of complaints of discrimination on grounds of race, color, religion, sex, or national origin comply with the principles and requirements in sections 713.212 through 713.222.

Sec. 713.212 **Coverage.** (a) The agency shall provide in its regulations for the acceptance of a complaint from any aggrieved employee or applicant for employment who believes that he has been discriminated against because of race, color, religion, sex, or national origin. A complaint may also be filed by an organization for the aggrieved person with his consent.

with that agency

(b) Sections 713.211 through 713.222 do not apply to the consideration by an agency of a general allegation of discrimination by an organization or other third party which is unrelated to an individual complaint of discrimination subject to sections 713.211 through 713.222.

(Section 713.251 applies to general allegations by organizations or other third parties.)

Sec. 713.213 **Precomplaint processing.** (a) An agency shall require that an aggrieved person who believes that he has been discriminated against because of race, color, religion, sex, or national origin consult with an Equal Employment Opportunity Counselor when he wishes to resolve the matter. The agency shall require the Equal Employment Opportunity Counselor to make whatever inquiry he believes necessary into the matter; to seek a solution of the matter on an informal basis; to counsel the aggrieved person concerning the merits of the matter; to keep a record of his counseling activities so as to brief, periodically, the Equal Employment Opportunity Officer on those activities; and, when advised that a complaint of discrimination has been accepted from an aggrieved person, to submit a written report to the Equal Employment Opportunity Officer, with a copy to the aggrieved person, summarizing his actions and advice both to the agency and the aggrieved person concerning the merits of the matter.

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The Equal Employment Opportunity Counselor shall, insofar as is practicable, conduct his final interview with the aggrieved person not later than 15 workdays after the date on which the

21 calendar days

If the final interview is not concluded within 21 days and the matter has not previously been resolved to the satisfaction of the aggrieved person, the aggrieved person shall be informed in writing at that time of his right to file a complaint of discrimination. The notice shall inform the complainant of his right to file a complaint at any time after receipt of the notice up to 15 calendar days after the final interview (which shall be so identified in writing by the Equal Employment Opportunity Counselor) and the appropriate official with whom to file a complaint. The Counselor shall not attempt in any way to restrain the aggrieved person from filing a complaint.

matter was called to his attention by the aggrieved person. The Equal Employment Opportunity Counselor shall advise the aggrieved person in the final interview of his right to file a complaint of discrimination with the organization's Equal Employment Opportunity Officer if the matter has not been resolved to his satisfaction and of the time limits governing the acceptance of a complaint in section 713.214. The Equal Employment Opportunity Counselor shall not reveal the identity of an aggrieved person who has come to him for consultation, except when authorized to do so by the aggrieved person, until the agency has accepted a complaint of discrimination from him.

(b) The agency shall assure that full cooperation is provided by all employees to the Equal Employment Opportunity Counselor in the performance of his duties under this section.

(b) The Equal Employment Opportunity Counselor shall be free from restraint, interference, coercion, discrimination, or reprisal in connection with the performance of his duties under this section.

(c)

and be signed by the complainant. The complaint may be delivered in person or submitted by mail.

Sec. 713.214 **Filing and presentation of complaint.** (a) *Time limits.* (1) An agency shall require that a complaint be submitted in writing by the complainant or his representative. The agency may accept the complaint for processing in accordance with this subpart only if—

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;

(i) the complainant brought to the attention of the Equal Employment Opportunity Counselor the matter causing him to believe he had been discriminated against within 15 calendar days of the date of that matter, or, if a personnel action, within 15 calendar days of its effective date; and

(ii) the complainant submitted his written complaint to the Equal Employment Opportunity Officer within 15 calendar days of the date of his final interview with the Equal Employment Opportunity Counselor.

or his representative
an appropriate official

(2) The appropriate officials to receive complaints are the head of the agency, the agency's Director of Equal Employment Opportunity, the head of a field installation, an Equal Employment Opportunity Officer, a Federal Women's Program Coordinator, and such other officials as the agency may designate for that purpose. Upon receipt of the complaint, the agency official shall transmit it to the Director of Equal Employment Opportunity or appropriate Equal Employment Opportunity Officer who shall acknowledge its receipt in accordance with subparagraph (3) of this paragraph.

Attachment 1 to FPM Ltr. 713-17 (10)

(3) A complaint shall be deemed filed on the date it is received, if delivered to an appropriate official, or on the date postmarked if addressed to an appropriate official designated to receive complaints. The agency shall acknowledge to the complainant or his representative in writing receipt of the complaint and advise the complainant in writing of all his administrative rights and of his right to file a civil action as set forth in section 713.281, including the time limits imposed on the exercise of these rights.

(4) The head of the agency or his designee may reject a complaint which was not timely filed and shall reject those allegations in a complaint which are not within the purview of section 713.212 or which set forth identical matters as contained in a previous complaint filed by the same complainant which is pending in the agency or has been decided by the agency. He may cancel a complaint because of failure of the complainant to prosecute the complaint. He shall transmit the decision to reject or cancel by letter to the complainant and his representative, and of his right to file a civil action as described in section 713.281.

[(2)] The agency shall extend the time limits in this section (i) when the complainant shows that he was not notified of the time limits and was not otherwise aware of them, or that he was prevented by circumstances beyond his control from submitting the matter within the time limits, or (ii) for other reasons considered sufficient by the agency.

(b) *Presentation of complaint.* At any stage in the presentation of a complaint, includin the counseling stage under section 713.213, the complainant [shall be free from restraint, interference, coercion, discrimination, or reprisal and] shall have the right to be accompanied, represented, and advised by a representative of his own choosing. If the complainant is an employee of the agency, he shall have a reasonable amount of official time to present his complaint if he is otherwise in an active duty status. If the complainant is an employee of the agency and he designates another employee of the agency as his representative, the representative shall [be free from restraint, interference, coercion, discrimination, or reprisal, and shall] have a reasonable amount of official time, if he is otherwise in an active duty status, to present the complaint.

Sec. 713.215 **Rejection or cancellation of complaint.** When the head of the agency, or his designee, decides to reject a complaint because it was not timely filed or because it is not within the purview of section 713.212 or to cancel a complaint because of a failure of the complainant to prosecute the complaint or because of a separation of the complainant which is not related to his complaint, he shall transmit the decision by letter to the complainant and his representative.] →The decision letter shall inform the complainant of his right to appeal the decision of the agency to the Commission and of the time limit within which the appeal may be submitted.[←]

Attachment 1 to FPM Ltr. 713-17 (11)

Sec. 713.216 **Investigation.** (a) The Equal Employment Opportunity Officer shall advise the Director of Equal Employment Opportunity of the acceptance of a complaint. The Director of Equal Employment Opportunity shall provide for the prompt investigation of the complaint. The person assigned to investigate the complaint shall occupy a position in the agency which is not, directly or indirectly, under the jurisdiction of the head of that part of the agency in which the complaint arose. The agency shall authorize the investigator to administer oaths and require that statements of witnesses shall be under oath or affirmation, without a pledge of confidence. The investigation shall include a thorough review of the circumstances under which the alleged discrimination occurred, the treatment of members of the complainant's group identified by his complaint as compared with the treatment of other employees in the organizational segment in which the alleged discrimination occurred, and any policies and practices related to the work situation which may constitute, or appear to constitute, discrimination even though they have not been expressly cited by the complainant. Information needed for an appraisal of the utilization of members of the complainant's group as compared to the utilization of persons outside the complainant's group shall be recorded in statistical form in the investigative file, but specific information as to a person's membership or nonmembership in the complainant's group needed to facilitate an adjustment of the complaint or to make an informed decision on the complaint shall, if available, be recorded by name in the investigative file. (As used in this subpart, the term "investigative file" shall mean the various documents and information acquired during the investigation under this section—including affidavits of the complainant, of the alleged discriminating official, and of the witnesses and copies of, or extracts from, records, policy statements, or regulations of the agency—organized to show their relevance to the complaint or the general environment out of which the complaint arose.) If necessary, the investigator may obtain information regarding the membership or nonmembership of a person in the complainant's group by asking each person concerned to provide the information voluntarily; he shall not require or coerce an employee to provide this information. [The agency shall furnish the complainant or his representative a copy of the investigative file.]

(b) The Director of Equal Employment Opportunity shall arrange to furnish to the person conducting the investigation a written authorization (1) to investigate all aspects of complaints of discrimination, (2) to require all employees of the agency to cooperate with him in the conduct of the investigation, and (3) to require employees of the agency having any knowledge of the matter complained of to furnish testimony under oath or affirmation without a pledge of confidence.

Sec. 713.217 **Adjustment of complaint and offer of hearing.** (a) The agency shall provide an opportunity for adjustment of the complaint on an informal basis after the complainant has reviewed the investigative file. If an adjustment of the complaint is arrived at, the terms of the adjustment shall be reduced to writing and made part of the complaint file, with a copy of the terms of the adjustment provided the complainant.

For this purpose, the agency shall furnish the complainant or his representative a copy of the investigative file promptly after receiving it from the investigator, and provide opportunity for the complainant to discuss the investigative file with appropriate officials.

If the agency does not carry out, or rescinds, any action specified by the terms of the adjustment for any reason not attributable to acts or conduct of the complainant, the agency shall, upon the complainant's written request, reinstate the complaint for further processing from the point processing ceased under the terms of the adjustment.

(b) If an adjustment of the complaint is not arrived at, the complainant shall be notified in writing [of the proposed disposition thereof. In that notice, the agency shall advise the complainant of →his right to a hearing with a subsequent decision by the head of the agency or his designee and his right to such a decision← without a hearing. The agency shall allow the complainant seven calendar days from receipt of the notice to notify the agency whether or not he wishes to have a hearing.]

(1) of the proposed disposition of the complaint, (2) of his right to a hearing and decision by the agency head or his designee if he notifies the agency in writing within 15 calendar days of the receipt of the notice that he desires a hearing, and (3) of his right to a decision by the head of the agency or his designee without a hearing.

15-day

(c) If the complainant fails to notify the agency of his wishes within the [7-day] period prescribed in paragraph (b) of this section, the appropriate Equal Employment Opportunity Officer may adopt the disposition of the complaint proposed in the notice sent to the complainant under paragraph (b) of this section as the decision of the agency on the complaint when delegated the authority to make a decision for the head of the agency under those circumstances. When this is done, the Equal

Employment Opportunity Officer shall transmit the decision by letter to the complainant and his representative which shall inform the complainant of his right of appeal to the Commission and the time limit applicable thereto. If the Equal Employment Opportunity Officer does not issue a decision under this paragraph, the complaint, together with the complaint file, shall be forwarded to the head of the agency, or his designee, for decision under section 713.221.

and of his right to file a civil action as described in section 713.281.

Sec. 713.218 **Hearing.** (a) *[Appeals] examiner.* The hearing shall be held by an [appeals] examiner who must be an employee of another agency except when the agency in which the complaint arose is (1) the government of the District of Columbia or (2) an agency which, by reason of law, is prevented from divulging information concerning the matter complained of to a person who has not received the security clearance required by that agency, in which event the agency shall arrange with the Commission for the selection of an impartial employee of the agency to serve as [appeals] examiner. (For purposes of this paragraph, the Department of Defense is considered to be a single agency.) The agency in which the complaint arose shall request the Commission to supply the name of an [appeals] examiner who has been certified by the Commission as qualified to conduct a hearing under this section.

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(b) *Arrangements for hearing.* The agency in which the complaint arose shall transmit the complaint file containing all the documents described in section 713.222 which have been acquired up to that point in the processing of the complaint, including the original copy of the investigative file (which shall be considered by the [appeals] examiner in making his recommended decision on the complaint), to the [appeals] examiner who shall review the complaint file to determine whether further investigation is needed before scheduling the hearing. When the [appeals] examiner determines that further investigation is needed, he shall remand the complaint to the Director of Equal Employment Opportunity for further investigation or arrange for the appearance of witnesses necessary to supply the needed information at the hearing. The requirements of section 713.216 apply to any further investigation by the agency on the complaint. The [appeals] examiner shall schedule the hearing for a convenient time and place.

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(c) *Conduct of hearing.* (1) Attendance at the hearing is limited to persons determined by the [appeals] examiner to have a direct connection with the complaint.

(2) The [appeals] examiner shall conduct the hearing so as to bring out pertinent facts, including the production of pertinent documents. Rules of evidence shall not be applied strictly, but the [appeals] examiner shall exclude irrelevant or unduly repetitious evidence. Information having a bearing on the complaint or employment policy or practices relevant to the complaint shall be received in evidence. The complainant, his representative, and the representatives of the agency at the hearing shall be given the opportunity to cross-examine witnesses who appear and testify. Testimony shall be under oath or affirmation.

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(d) *Powers of [appeals] examiner.* In addition to the other powers vested in the [appeals] examiner by the agency in accordance with this subpart, the agency shall authorize the [appeals] examiner to:

(1) Administer oaths or affirmations;

(2) Regulate the course of the hearing;

(3) Rule on offers of proof;

(4) Limit the number of witnesses whose testimony would be unduly repetitious; and

(5) Exclude any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing.

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any agency subject to this subpart

(e) *Witnesses at hearing.* The [appeals] examiner shall request [the agency] to make available as a witness at the hearing an employee requested by the complainant when he determines that the testimony of the employee is necessary. He shall also request the appearance of [any other employee] whose testimony he [desires to supplement the information in the investigative file. The appeals] examiner shall give the complainant his reasons for the denial of a request for the appearance of employees as witnesses and shall insert those reasons in the record of the hearing. [The agency] shall make its employees available as witnesses at a hearing on a complaint when requested to do so by the [appeals] examiner and it is [administratively practicable] to comply with the request. When it is [not administratively practicable] to comply with the request for a witness, the agency shall provide an explanation to the

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[appeals] examiner. If the explanation is inadequate, the [appeals] examiner shall so advise the agency and request it to make the employee available as a witness at the hearing. If the explanation is adequate, the [appeals] examiner shall insert it in the record of the hearing, provide a copy to the complainant, and make arrangements to secure testimony from the employee through a written interrogatory. [Employees of the] agency shall be in a duty status during the time [they are] made available as [witnesses. Witnesses shall be free from restraint, interference, coercion, discrimination, or reprisal in presenting their testimony at the hearing or during the investigation under section 713.216.]

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(f) *Record of hearing.* The hearing shall be recorded and transcribed verbatim. All documents submitted to, and accepted by, the [appeals] examiner at the hearing shall be made part of the record of the hearing. If the agency submits a document that is accepted, it shall furnish a copy of the document to the complainant. If the complainant submits a document that is accepted, he shall make the document available to the agency representative for reproduction.

complaints

(g) *Findings, analysis, and recommendations.* The [appeals] examiner shall transmit to the head of the agency or his designee (1) the complaint file (including the record of the hearing),

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(2) the findings and analysis of the [appeals] examiner with regard to the matter which gave rise to the complaint and the general environment out of which the complaint arose, and (3) the recommended decision of the [appeals] examiner on the merits of the complaint, including recommended remedial action, where appropriate, with regard to the matter which gave rise to the complaint and the general environment out of which the complaint arose. The [appeals] examiner shall notify the complainant of the date on which this was done. In addition, the [appeals] examiner shall transmit, by separate letter to the Director of Equal Employment Opportunity, whatever findings and recommendations he considers appropriate with respect to conditions in the agency [having no bearing on the matter which gave rise to the complaint or the general environment out of which the complaint arose.

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Sec. 713.219 **Relationship to other agency appellate procedures.** →(a) Except as provided in paragraphs (b) and (c) of this section, when an employee← makes a written allegation of discrimination on grounds of race, color, religion, sex, or national origin, in connection with an action that would otherwise be processed under →a grievance or appeals system← of the agency, the agency may process the allegation of discrimination under →that system when the system← meets the principles and requirements in sections 713.212 through 713.220 and the head of the agency, or his designee, makes the decision of the agency on the issue of discrimination. That decision on the issue of discrimination shall be incorporated in and become a part of the decision on the grievance or appeal.

→(b) An allegation of discrimination made in connection with an appeal under subpart B of part 771 of this chapter shall be processed under that subpart.

(c) An allegation of discrimination made in connection with a grievance under subpart C of part 771 of this chapter shall be processed under this part.←

Sec. 713.220 **Avoidance of delay.** (a) The complaint shall be resolved promptly. To this end, both the complainant and the agency shall proceed with the complaint without undue delay so that the complaint is resolved [except in unusual circumstances, within 60 calendar days after its receipt by the Equal Employment Opportunity Officer, exclusive of time spent in the processing of the complaint by the [appeals] examiner under section 713.218. ★★[When the complaint has not been resolved within this limit, the complainant may appeal to the Commission for a review of the reasons for the delay. Upon review of this appeal, the Commission may require the agency to take special measures to ensure prompt processing of the complaint or may accept the appeal for consideration under section 713.234.]

within 180 calendar days after it was filed, including

complaints

(b) The head of the agency or his designee may cancel a complaint if the complainant fails to prosecute the complaint without undue delay. However, instead of cancelling for failure to prosecute, the complaint may be adjudicated if sufficient information for that purpose is available.

(c) The agency shall furnish the Commission monthly reports on all complaints pending within the agency in a form specified by the Commission. If an agency has not issued a final decision, and has not requested the Commission to supply a complaints examiner, within 75 calendar days from the date a complaint was filed, the Commission may require the agency to take special measures to ensure prompt processing of the complaint or may assume responsibility for processing the complaint, including supplying an investigator to conduct any necessary investigation on behalf of the agency. When the Commission supplies an investigator, the agency shall reimburse the Commission for all expenses incurred in connection with the investigation and shall notify the complainant in writing of the proposed disposition of the complaint no later than 15 calendar days after its receipt of the investigative report.

(d) When the complaints examiner has submitted a recommended decision finding discrimination and the agency has not issued a final decision within 180 calendar days after the date the complaint was filed, the complaints examiner's recommended decision shall become a final decision binding on the agency 30 calendar days after its submission to the agency. In such event, the agency shall so notify the complainant of the decision and furnish to him a copy of the findings, analysis, and recommended decision of the complaints examiner under section 713.218(g) and a copy of the hearing record and also shall notify him in writing of his right of appeal to the Commission and the time limits applicable thereto and of his right to file a civil action as described in section 713.281.

Sec. 713.221 **Decision by head of agency or designee.** (a) The head of the agency, or his designee, shall make the decision of the agency on a complaint based on information in the complaint file. A person designated to make the decision for the head of the agency shall be one who is fair, impartial, and objective.

→(b)(1) The decision of the agency shall be in writing and shall be transmitted by letter to the complainant and his representative.

When there has been no hearing, the decision shall contain the specific reasons in detail for the agency's action, including any remedial action taken.

(2) When there has been a hearing on the complaint, the decision letter shall transmit a copy of the findings, analysis, and recommended decision of the [appeals] examiner under section 713.218(g) and a copy of the hearing record. The decision of the agency shall adopt, reject, or modify the decision recommended by the [appeals] examiner. If the decision is to reject or modify the recommended decision, the decision letter shall set forth the [reasons] for rejection or modification.

(3) When there has been no hearing and no decision under section 713.217(c), the decision letter shall set forth the findings, analysis, and decision of the head of the agency or his designee.

(c) The decision of the agency shall require any remedial action authorized by law determined to be necessary or desirable to resolve the issues of discrimination and to promote the policy of equal opportunity[,]

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specific reasons in detail

, whether or not there is a finding of discrimination. When discrimination is found, the agency shall require remedial action to be taken in accordance with section 713.271, shall review the matter giving rise to the complaint to determine whether disciplinary action against alleged discriminatory officials is appropriate, and shall record the basis for its decision to take, or not to take, disciplinary action but this decision shall not be included in the compla nt file.

(d) The decision letter shall inform the complainant of his right to appeal the decision of the agency to the Commission [and of the time limit within which the appeal may be submitted.]

, of his right to file a civil action in accordance with section 713.281, and of the time limits applicable thereto.

Sec. 713.222 **Complaint file.** The agency shall establish a complaint file [containing] all documents pertinent to the complaint. The

. Except as provided in section 713.221(c), this file shall contain

complaint file shall include copies of [(a)] the written report of the Equal Employment Opportunity Counselor under section 713.213 to the Equal Employment Opportunity Officer on whatever precomplaint counseling efforts were made with regard to the complainant's case, [(b)] the complaint, [(c)] the investigative file, [(d)] if the complaint is withdrawn by the complainant, a written statement of the complainant or his representative to that effect, [(e)] if adjustment of the complaint is arrived at under section 713.217, the written record of the terms of the adjustment, [(f)] if no adjustment of the complaint is arrived at under section 713.217, a copy of the letter notifying the complainant of the proposed disposition of the complaint and of his right to a hearing, [(g)] if decision is made under section 713.217(c), a copy of the letter to the complainant transmitting that decision, [(h)] if a hearing was held, the record of the hearing, together with the [appeals] examiner's findings, analysis, and recommended decision on the merits of the complaint, [(i)] if the Director of Equal Employment Opportunity is not the

(a) the notice of the Equal Employment Opportunity Counselor to the aggrieved person under section 713.213(a), (b)

(c)

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designee, the recommendations, if any, made by him to the head of the agency or his designee, and (j) if decision is made under section 713.221, a copy of the letter transmitting the decision of the head of the agency or his designee. The complaint file shall not contain any document that has not been made available to the complainant or to his designated physician under section 294.401 of this chapter.

(k)

, or a portion thereof, for reasons covered by section 713.215;

Appeal to the Commission

Sec. 713.231 Entitlement. (a) Except as provided by paragraph (b) of this section, a complainant may appeal to the Commission the decision of the head of the agency, or his designee:

(1) To reject his complaint because (i) it was not timely filed, or (ii) it was not within the purview of the agency's regulations; or

(2) To cancel his complaint (i) because of the complainant's failure to prosecute his complaint or (ii) because of the complainant's separation which is not related to his complaint; or

(3) On the merits of the complaint, under section 713.217(c) or 713.221, but the decision does not resolve the complaint to the complainant's satisfaction.

(b) A complainant may not appeal to the Commission under paragraph (a) of this section when the issue of discrimination giving rise to the complaint is being considered, or has been considered, in connection with any other appeal by the complainant to the Commission.

Sec. 713.232 Where to appeal. The complainant shall file his appeal in writing, either personally or by mail, with the Board of Appeals and Review, U.S. Civil Service Commission, Washington, D.C. 20415.

Sec. 713.233 Time limit. (a) Except as provided in paragraph (b) of this section, a complainant may file an appeal at any time after receipt of his agency's notice of final decision on his complaint but not later than 15 calendar days after receipt of that notice.

(b) The time limit in paragraph (a) of this section may be extended in the discretion of the Board of Appeals and Review, upon a showing by the complainant that he was not notified of the prescribed time limit and was not otherwise aware of it or that circumstances beyond his control prevented him from filing an appeal within the prescribed time limit.

Sec. 713.234 Appellate procedures. The Board of Appeals and Review shall review the complaint file and all relevant written representations made to the board. The board may remand a complaint to the agency for further investigation or a rehearing if it considers that action necessary or have additional investigation conducted by Commission personnel. This subpart applies to any further investigation or rehearing resulting from a remand from the board. There is no right to a hearing before the board. The board shall issue a written decision setting forth its reasons for the decision and shall send copies thereof to the complainant, his designated representative, and the agency. When corrective action is ordered, the agency shall report promptly to the board that the corrective action has been taken. The decision of the board is final, and there is no further right to appeal.

but shall contain a notice of the right to file a civil action in accordance with Section 713.282

Sec. 713.235 Review by the Commissioners. The Commissioners may, in their discretion, reopen and reconsider any previous decision when the party requesting reopening submits written argument or evidence which tends to establish that:

(1) New and material evidence is available that was not readily available when the previous decision was issued;

(2) The previous decision involves an erroneous interpretation of law or regulation or a misapplication of established policy; or

(3) The previous decision is of a precedential nature involving a new or unreviewed policy consideration that may have effects beyond the actual case at hand, or is otherwise of such an exceptional nature as to merit the personal attention of the Commissioners.

Sec. 713.236 Relationship to other appeals. When the basis of the complaint of discrimination because of race, color, religion, sex, or national origin involves an action which is otherwise appealable to the Commission, the case, including the issue of discrimination, will be processed under the regulations appropriate to that appeal when the complainant makes a timely appeal to the Commission in accordance with those regulations.

and the complainant having been informed by the agency of his right to proceed under this subpart elects to proceed by appeal to the Commission,

Reports to the Commission

Sec. 713.241 Reports to the Commission. Each agency shall report to the Commission information concerning precomplaint counseling

on complaints

tatus and disposition of complaints subpart at such times and in such the Commission prescribes.

Third Party Allegations

Sec. 713.251 Third-party allegations of discrimination. (a) Coverage. This section applies to general allegations by organizations or other third parties of discrimination in personnel matters within the agency which are unrelated to an individual complaint of discrimination subject to section 713.211 through 713.222.

(b) Agency procedure. The organization or other third party shall state the allegation with sufficient specificity so that the agency may investigate the allegation. The agency may require additional specificity as necessary to proceed with its investigation. The agency shall establish a file on each general allegation, and this file shall contain copies of all material used in making the decision on the allegation. The agency shall furnish a copy of this file to the party submitting the allegation and shall make it available to the Commission for review on request. The agency shall notify the party submitting the allegation of its decision, including any corrective action taken on the general allegations, and shall furnish to the Commission on request a copy of its decision.

(c). Commission procedures. If the third party disagrees with the agency decision, it may, within 30 days after receipt of the decision, request the Commission to review it. The request shall be in writing and shall set forth with particularity the basis for the request. When the Commission receives such a request, it shall make, or require the agency to make, any additional investigations the Commission deems necessary. The Commission shall issue a decision on the allegation ordering such corrective action, with or without back pay, as it deems appropriate.

Freedom from Reprisal or Interferences

Section 713.261. Freedom from reprisal. (a) Complainants, their representatives, and witnesses shall be free from restraint, interference, coercion, discrimination or reprisal at any stage in the presentation and processing of a complaint, including the counseling stage under section 713, or any time thereafter.

Sec. 713.262 Review of allegations of reprisal. (a) Choice of review procedures. A complainant, his representative, or a witness who alleges restraint, interference, coercion, discrimination, or reprisal in connection with the presentation of a complaint under this subpart, may, if an employee or applicant, have the allegation reviewed as an individual complaint of discrimination subject to section 713.211 through 713.222 or as a charge subject to paragraph (b) of this section.

(b) Procedure for review of charges. (1) An employee or applicant may file a charge of restraint, interference, coercion, discrimination, or reprisal in connection with the presentation of a complaint with an appropriate agency official as defined in section 713.214 (a) (2) within 15 calendar days of the date of the alleged occurrence. The charge shall be in writing and shall contain all pertinent facts. Except as provided in subparagraph (2) of this paragraph, the agency shall undertake an appropriate inquiry into such a charge and shall forward to the Commission within 15 calendar days of the date of its receipt a copy of the charge

and report of action taken. The agency shall also provide the charging party with a copy of the report of action taken. When the agency has not completed an appropriate inquiry 15 calendar days after receipt of such a charge, the charging party may submit a written statement with all pertinent facts to the Commission, and the Commission shall require the agency to take whatever action is appropriate.

(c) When a complainant, after completion of the investigation of his complaint under section 713.216, requests a hearing and in connection with that complaint alleges restraint, interference, coercion, discrimination, or reprisal, the complaints examiner assigned to hold the hearing shall consider the allegations as an issue in the complaint at hand or refer the matter to the agency for further processing under the procedure chosen by the complainant pursuant to paragraph (a) of this section.

Remedial Actions

Sec. 713.271 Remedial actions. (a) Remedial action involving an applicant. (1) When an agency, or the Commission, finds that an applicant for employment has been discriminated against and except for that discrimination would have been hired, the agency shall offer the applicant employment of the type and grade denied him. The offer shall be made in writing. The individual shall have 15 calendar days from receipt of the offer within which to accept or decline the offer. Failure to notify the agency of his decision within the 15-day period will be considered a declination of the offer, unless the individual can show that circumstances beyond his control prevented him from responding within the

time limit. If the offer is accepted, appointment shall be retroactive to the date the applicant would have been hired, subject to the limitation in subparagraph (4) of this paragraph. Back pay, computed in the same manner prescribed by section 550.804 of this chapter, shall be awarded from the beginning of the retroactive period, subject to the same limitation, until the date the individual actually enters on duty. The individual shall be deemed to have performed service for the agency during this period of retroactivity for all purposes except for meeting service requirements for completion of a probationary or trial period that is required. If the offer is declined, the agency shall award the individual a sum equal to the back pay he would have received, computed in the same manner prescribed by section 550.804 of this chapter, from the date he would have been appointed until the date the offer was made, subject to the limitation of subparagraph (4) of this paragraph. The agency shall inform the applicant, in its offer, of his right to this award in the event he declines the offer.

(2) When an agency, or the Commission, finds that discrimination existed at the time the applicant was considered for employment but does not find that the individual is the one who would have been hired except for discrimination, the agency shall consider the individual for any existing vacancy of the type and grade for which he had been considered initially and for which he is qualified before consideration is given to other candidates. If the individual is not selected, the agency shall record the reasons for non-selection. If no vacancy exists, the agency shall give him this priority consideration for the next vacancy for which he is qualified. This priority shall take precedence over

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priorities provided under other regulations in this chapter.

(3) This paragraph shall be cited as the authority under which the above-described appointments or awards of back pay shall be made.

(4) A period of retroactivity or a period for which back pay is awarded under this paragraph may not extend from a date earlier than two years prior to the date on which the complaint was intitially filed by the applicant. If a finding of discrimination was not based on a complaint, the period of retroactivity or period for which back pay is awarded under this paragraph may not extend earlier than two years prior to the date the finding of discrimination was recorded.

(b) Remedial action involving an employee. When an agency, or the Commission, finds that an employee of the agency was discriminated against and as a result of that discrimination was denied an employment benefit, or an administrative decision adverse to him was made, the agency shall take remedial actions which shall include one or more of the following, but need not be limited to these actions:

(1) Retroactive promotion, with back pay computed in the same manner prescribed by section 550.804 of this chapter, when the record clearly shows that but for the discrimination the employee would have been promoted or would have been employed at a higher grade, except that the back pay liability may not accrue from a date earlier than two years prior to the date the discrimination complaint was filed, but, in any event, not to exceed the date he would have been promoted. If a finding of discrimination was not based on a complaint, the back pay liability may not accrue from a date earlier than two years prior to the date the finding of discrimination was recorded, but, in any event, not to exceed the date he would have been promoted.

(2) Consideration for promotion to a position for which he is qualified before consideration is given to other candidates when the record shows that discrimination existed at the time selection for promotion was made but it is not clear that except for the discrimination the employee would have been promoted. If the individual is not selected, the agency shall record the reasons for nonselection. This priority consideration shall take precedence over priorities under other regulations in this chapter.

(3) Cancellation of an unwarranted personnel action and restoration of the employee.

(4) Expunction from the agency's records of any reference to or any record of an unwarranted disciplinary action that is not a personnel action.

(5) Full opportunity to participate in the employee benefit denied him (e.g., training, preferential work assignments, overtime scheduling).

Right to File a Civil Action

Sec. 713.281 Statutory right. An employee or applicant is authorized by section 717 (c) of the Civil Rights Act, as amended, 84 Stat. 112, to file a civil action in an appropriate United States District Court within:

(a) Thirty (30) calendar days of his receipt of notice of final action taken by his agency on a complaint,

(b) One hundred-eighty (180) calendar days from the date of filing a complaint with his agency if there has been no decision,

(c) Thirty (30) calendar days of his receipt of notice of final action taken by the Commission on his complaint, or,

(d) One hundred-eighty (180) calendar days from the date of filing an appeal with the Commission if there has been no Commission decision.

Sec. 713.282 Notice of right. An agency shall notify an employee or applicant of his right to file a civil action, and of the 30-day time limit for filing, in any final action on a complaint under section 713.215, 713.217, or 713.221. The Commission shall notify an employee or applicant of his right to file a civil action, and of the 30-day time limit for filing, in any decision under section 713.234.

Sec. 713.283 Effect on administrative processing. The filing of a civil action by an employee or applicant does not terminate agency processing of a complaint or Commission processing of an appeal under this subpart.

Subject: NOTICE OF RIGHT TO FILE A DISCRIMINATION COMPLAINT

From: EEO Counselor (Specific Installation) DATE:

To: Name of Person Counseled

This is to inform you that although counseling on the matter you brought to the attention of the EEO Counselor has not been completed, 21 calendar days have gone by since you first contacted the Counselor and you are now entitled, if you want to do so, to file a discrimination complaint if you believe you have been discriminated against on the basis of race, color, religion, sex or national origin.

If you do not file a complaint at this time, counseling will continue and your right to file a complaint will also continue until 15 calendar days AFTER THE FINAL INTERVIEW with the Counselor. The Counselor will inform you in writing when the final counseling interview is conducted.

If you file a complaint, it must be in writing and be filed in person or by mail with the Director of Equal Employment Opportunity (provide specific mailing address), or any of the following officials authorized to receive discrimination complaints:

- o Agency Head
  (Provide address)
- o Installation Head
  (Provide address)
- o EEO Officer
  (Provide address)
- o Federal Women's Program Coordinator
  (Provide address)

Note to Agency:

A copy of this notice should be kept by the Counselor. If a complaint is filed, the copy should accompany the Counselor's report on is counseling activities and made a part of the complaint file. This notice should be given by the Counselor to the person counseled 21 calendar days after the Counselor was first consulted on the matter by the employee or applicant.

Attachment 3 to FPM Ltr. 713-17

Subject: NOTICE OF FINAL INTERVIEW WITH EEO COUNSELOR

From: EEO Counselor (Specific Installation) DATE:

To: Name of Person Counseled

This is notice of the final counseling interview in connection with the matter you presented to the EEO Counselor.

If you believe you have been discriminated against on the basis of race, color, religion, sex or national origin, you have the right to file a COMPLAINT OF DISCRIMINATION WITHIN 15 CALENDAR DAYS AFTER RECEIPT OF THIS NOTICE.

The complaint must be in writing and may be filed in person or by mail with the Director of Equal Employment Opportunity (provide specific mailing address), or any of the following officials authorized to receive discrimination complaints:

- o Agency Head
  (Provide address)
- o Installation Head
  (Provide address)
- o EEO Officer
  (Provide address)
- o Federal Women's Program Coordinator
  (Provide address)

Note to Agency:

A copy of this notice should be kept by the Counselor. If a complaint is filed, the copy should accompany the Counselor's report on his counseling activities and made a part of the complaint file.

Attachment 4 to FPM Ltr. 713-17

Subject: NOTICE OF RECEIPT OF DISCRIMINATION COMPLAINT

From: Director of EEO (or other appropriate official) DATE:

To: Complainant

The purpose of this notice is to acknowledge receipt of your discrimination complaint and to provide you with written notification of your rights as well as the time requirements for exercising those rights. If you have further questions ask your EEO Counselor or Equal Employment Opportunity Officer.

- o Your complaint will be investigated. Based on the information developed by the investigation an effort at an adjustment on an informal basis will be made. You will receive a copy of the investigative report and have an opportunity to discuss it with an appropriate agency official.
- o If an adjustment of the complaint is arrived at, the terms of the adjustment will be reduced to writing and you will be provided a copy.
- o If an adjustment of the complaint is not arrived at, you will be notified in writing of the proposed disposition of the complaint. You will also be notified of your right to a hearing by an EEO Complaints Examiner who will recommend a decision to your agency, or to a decision by the agency head or his designee without a hearing. If you want a hearing, or a decision by the agency head or his designee without a hearing, you must NOTIFY THE AGENCY IN WRITING WITHIN 15 CALENDAR DAYS OF RECEIPT OF THE PROPOSED DISPOSITION OF YOUR COMPLAINT.
- o If you fail to request a hearing or to ask for a decision by the agency head without a hearing within the 15 days of your receipt of the proposed disposition, that disposition will become the final decision of the agency. YOU MAY APPEAL THE FINAL AGENCY DECISION ON YOUR COMPLAINT TO THE COMMISSION WITHIN 15 CALENDAR DAYS OR YOU MAY FILE A CIVIL ACTION IN AN APPROPRIATE U. S. DISTRICT COURT WITHIN 30 DAYS.

Attachment 4 to FPM Ltr. 713-17 (2)

- o If you are dissatisfied with the final decision of the agency (after a hearing or without a hearing), you may appeal to the Civil Service Commission within 15 calendar days of receipt of the notice or within 30 days you may file a civil action in an appropriate U.S. District Court.

- o If you decide to appeal to the Commission's Board of Appeals and Review you will still have an opportunity to file a civil action in U.S. District Court within 30 days after receipt of the Board's decision, or within 180 days of your appeal to the Board if no final decision has been rendered.

- o If the agency has not issued a final decision on your complaint within 180 days of the date it was filed, you may file a civil action in an appropriate U.S. District Court.

Note to Agency:

A copy of the notice as given to the complainant should be filed by the agency in the complaint file.

Attachment 5 to FPM Ltr. 713-17

Subject: NOTICE OF PROPOSED DISPOSITION OF DISCRIMINATION COMPLAINT

From: EEO Officer DATE:

To: Complainant

The purpose of this notice is to inform you of the proposed disposition of your discrimination complaint and your rights if you are dissatisfied with the proposed disposition.

- o PROPOSED DISPOSITION

  (State the specific proposed disposition of the complaint)

- o RIGHT OF HEARING

  If you are dissatisfied with the proposed disposition, you may request a hearing and decision by the agency head or his designee, if YOU NOTIFY THE AGENCY WITHIN 15 CALENDAR DAYS OF RECEIPT OF THE NOTICE that you desire a hearing.

- o RIGHT OF DECISION WITHOUT A HEARING

  If you are dissatisfied with the proposed disposition, you may request a decision by the head of the agency or his designee without a hearing.

If you fail to notify the agency of your wishes within the 15 day period, the EEO Officer may adopt as the agency's final decision the proposed disposition shown above and will so notify you in writing. Upon receipt of notification you may appeal to the Civil Service Commission within 15 calendar days or file a civil action in a Federal District Court within 30 days.

If you appeal to the Commission, you may still file a civil action within 30 days of receipt of the Commission decision or within 180 days of your appeal to the Commission if you have not received a final decision from the Commission.

Note to Agency:

A copy of the notice as given to the complainant should be filed by the agency in the complaint file.

Attachment 6 to FPM Ltr. 713-17

Subject: NOTICE OF FINAL DECISION OF AGENCY

From: Agency Head or Designee DATE:

To: Complainant

Attached to this notice is the final decision of the agency on your complaint of discrimination. If you are dissatisfied with this final decision, you have the following appeal rights:

- o You may appeal to the Civil Service Commission within 15 calendar days of receipt of the decision.
- o You may file a civil action in an appropriate U. S. District Court within 30 days of receipt of the decision.
- o If you elect to appeal to the Commission, a civil action in a U. S. District Court may be filed within 30 days of receipt of the Commission's final decision.
- o A civil action may also be filed anytime after 180 days of the date of initial appeal to the Commission, if there has not been a final decision rendered.

Note To Agency:

This form is to be used under the following circumstances:

(1) when a discrimination complaint is rejected or cancelled;

(2) when a proposed disposition is adopted after failure to request a hearing or decision by the agency without a hearing;

(3) when a final agency decision is made after a recommended decision by the Complaints Examiner; and,

(4) when an agency makes a final decision on the merits without a hearing.

A copy of the notice as given to the complainant should be filed by the agency in the complaint file.

GPO 862-130

APPENDIX C

Documents Related to EEO Procedures

UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON, D.C. 20415

IN REPLY PLEASE REFER TO

YOUR REFERENCE

OCT 24 1974

Ms. Phyllis McClure
NAACP Legal Defense Fund
Room 510
1028 Connecticut Avenue N.W.
Washington, D. C. 20036

Dear Ms. McClure:

This responds to your telephone request of October 23, 1974. Enclosed are materials which provide guidance for the investigation of EEO discrimination complaints and describe the complaint process. This list, though not comprehensive, consists of instructions, regulations and guidelines which we rely on most in providing assistance to complainants and agencies in the processing of EEO complaints.

* 1) FPM Letter No. 713-17
2) FPM Letter No. 713-21
3) FPM Letter No. 713-28
4) FPM Letter No. 713-20
5) Chairman letter June 18, 1973
6) Bulletin No. 713-34
7) Bulletin No. 713-35
8) Personnel Methods Series No. 18
* 9) Appendix B-6, FPM Chapter 713 (under revision)
**10) Personnel Methods Series No. 17

* Guidance on the investigation of discrimination complaints.
** Revised October 1974 (pending publication)

I hope this information answers some of your questions. If we can be of further assistance let us know.

Sincerely yours,

Walter J. Dent

Walter J. Dent, Acting Chief
Discrimination Complaints and
Enforcement Section

1883-1973

MERIT PRINCIPLES ASSURE QUALITY AND EQUAL OPPORTUNITY

UNITED STATES CIVIL SERVICE COMMISSION
APPEALS REVIEW BOARD
Washington, D. C. 20415

D E C I S I O N

IN THE MATTER OF

MILTON JONES, JR.

TYPE CASE: Discrimination Based On Race

Before: Roel, Bechtold and McDonald, Board Members

INTRODUCTION

The complainant appealed from the March 19, 1974, decision by the Director of Equal Employment Opportunity, Department of the Army, which found that the complainant had not been discriminated against because of his race in connection with his non-selection for promotion to a GS-12 Architect position. The agency decision further found that the complainant had been discriminated against because of his race in his employment situation at the Mobile District, Corps of Engineers.

STATEMENT OF THE CASE

The complainant, a Black male, is employed by the Mobile District, Corps of Engineers, in the position of Architect, GS-11.

On July 12, 1972, the complainant contacted an Equal Employment Opportunity Counselor and indicated his desire to file a discrimination complaint concerning the selection of another employee for a vacant GS-12 Architect's position. No informal resolution of the matter was reached and complainant filed a formal complaint of discrimination on September 21, 1972, alleging that racial discrimination had occured in the selection of another employee for the vacancy in question.

An investigation was conducted and an investigative report submitted on January 26, 1973. Based on the investigative report, a proposed disposition of the complaint was issued by the agency on November 2, 1973, denying the complaint of discrimination. The complainant then requested a hearing in connection with his complaint, which was conducted on November 30, 1973. In his report, the Complaint's Examiner recommended that a

finding be made that the allegation of discrimination based on race was not supported by the evidence.

AGENCY DECISION

The final agency decision, issued on March 19, 1974, held that the evidence of record did not substantiate complainant's allegation of racial discrimination in regard to his non-selection for promotion to the position of Architect, GS-12. However, the agency found that the Mobile District, Corps of Engineers had failed to implement the agency's affimative Equal Employment Opportunity program; that the complainant had not been provided the opportunity for maximum utilization of his education and training; and that the complainant had been subjected to a climate of racial prejudice in the work environment at the Mobile District. The agency also found that complainant's promotional opportunities had been adversely affected and that except for his race, he might have progressed under the Department's Career Program to the GS-12 level in the Mobile District or elsewhere in the Corps of Engineers. It was also the agency decision that complainant was otherwise discriminated against in his employment situation. Based on its findings, the agency directed that the complainant be given continuing priority consideration for available GS-12 vacancies in the Mobile District, Corps of Engineers, for which he is qualified, until complainant is selected for promotion or until he declines a bona fide offer.

REPRESENTATIONS TO THE APPEALS REVIEW BOARD

In his letter of appeal to the Board dated April 18, 1974, the complainant expressed dissatisfaction with the agency's decision and requested a review of his case. Specifically, the complainant questioned the thoroughness of the investigative findings of the Investigator assigned to his case, and he questioned the appraisals given the three candidates for the GS-12 position in question. Complainant also refers to a further act of alleged discrimination occurring within the last five months, not previously made a part of his complaint of discrimination.

ANALYSIS AND FINDINGS

The Board has considered the complainant's allegations in light of the entire record established in his case. As a result of its review, the Board finds that the complainant's allegation of racial discrimination in connection with his non-selection for promotion to the specific GS-12 Architect position is unsupported by the evidence of record.

Complainant's main argument throughout the complaint of discrimination has been that he was the best qualified of the three candidates for the position

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in question. In this connection he questions the appraisals given to the other candidates by their supervisor, which appraisals formed the basis for the selecting official's final choice for the position.

The Board finds no evidence, other than the complainant's unsupported allegations, that the appraisals in question were the result of racial bias on the part of the official who completed those appraisals, and that said official was not listed as an alleged discriminating party. The record reflects that each of the candidates for the position in question was rated "Highly Qualified" for the position and the choice of any one of the candidates would have been justifiable. Moreover, the record indicates that the selecting official (who is the alleged discriminating party) based his selection upon his intimate acquaintance with the work, experience and knowledges of all of the candidates, not just on the promotion appraisals.

In situations where the available candidates are substantially equally qualified for a position, the selecting official has the discretion to choose the candidate whom he believes can best perform the duties of the position. In this case, there is no evidence that the selecting official's evaluation of the candidates and his subsequent selection for the position were based in any way upon any consideration of the candidates' races.

While there is evidence of past inequality of treatment of the complainant which, as determined by the agency Director of Equal Employment Opportunity indicates that the complainant was not given equal training and opportunity for advancement, the evidence strongly indicates that any charge of discrimination in these practices would be laid against the prior Section Chief rather than the supervisor named by the complainant. In any event, the Board finds insufficient objective evidence to show that the failure to select the complainant for the vacant GS-12 position was because of his race.

The complainant noted that copies of employee appraisals completed on June 1, 1972, were not included in the investigative file, and he has requested that the Board review the appraisals and the personnel files of the three candidates for the position in question in order to make a decision on the relative qualifications of these candidates. The complainant has charged that the personnel files of the candidates will not substantiate the appraisals in question.

With regard to the exclusion of the appraisals from the investigative report, the Board notes that employee appraisals are considered to be confidential to the individual involved and that there is considerable latitude under Civil Service Commission regulations regarding the inclusion of such appraisals in the investigative report. The Board also notes that employee appraisals are highly subjective in nature and are between the employee, his supervisor, and agency management. Finally, as noted above, the selecting official indicated in his justification for

the selection he made that he used not only the employee appraisal but also his personal knowledge of the abilities and performance of the candidates, with all three of whom he had a long and close working relationship. Under the circumstances, the Board has no basis for any independent review of the relative qualifications of the three candidates for the GS-12 position.

Complainant, in his appeal to the Board, has also provided information not previously a part of his complaint of discrimination, not considered by the agency in the processing of his current complaint, and not covered in the agency's final decision. Accordingly, this information is not a matter for review by the Board in its adjudication of this appeal.

The Board notes that while the agency found no evidence of racial discrimination in complainant's non-selection for promotion to the GS-12 vacancy in this instance, the agency did recommend corrective action be taken in the complainant's case based on a finding that the Mobile District, Corps of Engineers, had failed to implement the agency's affirmative Equal Employment Opportunity program. The corrective action was to take the form of continuing priority consideration to the complainant for GS-12 vacancies. (Complainant was promoted to a GS-12 Architect's position on May 5, 1974 according to information furnished the Board and thus, the priority consideration recommendation would now be moot.)

DECISION

Pursuant to the foregoing, the decision issued by the Department of the Army in this case dated March 19, 1974, is hereby affirmed.

Civil Service regulations provide that the decision of the Board is final and that there is no further right of administrative appeal. However, if the complainant is not satisfied with this decision, he is entitled, under section 717(c) of the Civil Rights Act of 1964, as amended on March 24, 1972, to file a civil action in an appropriate U.S. District Court within thirty (30) calendar days of his receipt of this decision.

For the Commissioners:

William P. Berzak

William P. Berzak
Chairman

October 4, 1974

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION
LYNDON B JOHNSON SPACE CENTER
HOUSTON, TEXAS 77058

REPLY TO ATTN OF: AJ

November 27, 1974

TO: JF34/Sylvester A. Barrett

FROM: AJ/Equal Opportunity Officer

SUBJECT: Notice of Proposed Disposition of Discrimination Complaint

The purpose of this notice is to inform you of the proposed disposition of your discrimination complaint and your rights if you are dissatisfied with the proposed disposition.

- Proposed Disposition

This office has been unable to informally settle your complaint. It would appear that the evidence as presented at this time does not fully support your allegation of discrimination. With regard to the back pay issue, no award can be made without a finding of discrimination by the Assistant Administrator for Equal Opportunity Programs. We, therefore, offer the following disposition which was stated in the proposed adjustment letter dated November 12, 1974: "When a GS-7 position becomes vacant within the Redistribution and Utilization Section or similar area in which you have adequate experience, you will be regarded as a strong candidate. In the event that you apply, this office and your organization director will review your qualifications and the total selection process to the extent necessary to determine that you are given all proper consideration for that position."

We feel that you should be advised of your right to a hearing or your right to a decision without a hearing.

No further action will be taken on your complaint by this office.

- Right of Hearing

If you are dissatisfied with the proposed disposition, you may request a hearing and decision by the Agency head or his designee, if *you notify the Agency within 15 calendar days of receipt of the notice* that you desire a hearing.

If you request a hearing you are expected to proceed without delay in presenting your complaint before the assigned Complaints Examiner. If you plan to have a representative, you should immediately obtain representation and you should also begin preparing a list of proposed witnesses with a summary of the testimony you believe each would present at the hearing. The Complaints Examiner will request this list immediately after being assigned to your case.

Failure to prosecute your complaint without undue delay may be grounds for the Complaints Examiner to return your case to the Agency. The Agency may thereafter issue a final decision based on the evidence present in the complaint file.

Right or Decision Without A Hearing

If you are dissatisfied with the proposed disposition, you may request a decision by the head of the Agency or his designee without a hearing, based upon the evidence present in the complaint file.

If you fail to notify the Agency of your wishes within the 15 day period, the EEO Officer may adopt as the Agency's final decision the proposed disposition shown above and will so notify you in writing. Upon receipt of notification you may appeal to the Civil Service Commission's Appeals Review Board within 15 calendar days.

We recognize that you have exercised your right to file a civil action in Federal District Court. Nevertheless, we are continuing to process your case administratively within the Agency.

Joseph D. Atkinson, Jr.

cc:
BH6/Aneta A. Davis
Gabrielle K. McDonald
1834 Southmore Blvd., Suite 203
Houston, Texas 77004

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION
LYNDON B. JOHNSON SPACE CENTER
HOUSTON, TEXAS 77058

REPLY TO ATTN OF: AJ

November 27, 1974

TO: JF37/Gloria A. Williams

FROM: AJ/Equal Opportunity Officer

SUBJECT: Notice of Proposed Disposition of Discrimination Complaint

The purpose of this notice is to inform you of the proposed disposition of your discrimination complaint and your rights if you are dissatisfied with the proposed disposition.

- Proposed Disposition

In an attempt to informally resolve your situation, numerous meetings have resulted in 3 positive actions:

1. Promotion to GS-5, May 1974

2. Reassignment to the Center Property Section, Property Branch, Logistics Division (Proposed Adjustment Letter, paragraph "a", dated October 31, 1974)

3. Strong consideration for upward mobility program consistent with your interests and qualifications when the next class is announced (Proposed Adjustment Letter, paragraph "b", dated October 31, 1974). In the event of your selection for this position, you would be promoted to a GS-7 upon satisfactory completion of the one-year training required by the program.

Even though we have made positive efforts as stated above, there still remains the unresolved issue of back pay. Under the existing constraints, we are unable to consider back pay without a finding of discrimination by the Assistant Administrator for Equal Opportunity Programs. It would appear that the evidence, as presented at this time, does not fully support the allegation of discrimination; therefore, no further action will be taken on your complaint by this office. However, this does not mean that additional appeals routes are not available for further review as stated below. In view of the fact that we have exhausted all possible actions within our authority, we feel that you should be advised of your right to a hearing or your right to a decision without a hearing.

- Right of Hearing

If you are dissatisfied with the proposed disposition, you may request a hearing and decision by the Agency head or his designee, *if you notify the Agency within 15 calendar days of receipt of the notice* that you desire a hearing.

- *If you request a hearing you are expected to proceed without delay in presenting your complaint before the assigned Complaints Examiner. If you plan to have a representative, you should immediately obtain representation and you should also begin preparing a list of proposed witnesses with a summary of the testimony you believe each would present at the hearing. The Complaints Examiner will request this list immediately after being assigned to your case.*

Failure to prosecute your complaint without undue delay may be grounds for the Complaints Examiner to return your case to the Agency. The Agency may thereafter issue a final decision based on the evidence present in the complaint file.

- Right of Decision Without A Hearing

If you are dissatisfied with the proposed disposition, you may request a decision by the head of the Agency or his designee without a hearing, based upon the evidence present in the complaint file.

If you fail to notify the Agency of your wishes within the 15 day period, the EEO Officer may adopt as the Agency's final decision the proposed disposition shown above and will so notify you in writing. Upon receipt of notification you may appeal to the Civil Service Commission's Appeals Review Board within 15 calendar days.

We recognize that you have exercised your right to file a civil action in Federal District Court. Nevertheless, we are continuing to process your case administratively within the Agency.

Joseph D. Atkinson, Jr.

cc:
BH6/Aneta A. Davis
Gabrielle K. McDonald
1834 Southmore Blvd., Suite 203
Houston, Texas 77004

UNITED STATES CIVIL SERVICE COMMISSION
FEDERAL EMPLOYEE APPEALS AUTHORITY

Atlanta Field Office
1340 Spring Street, N.W.
Atlanta, Georgia 30309

IN REPLY PLEASE REFER TO
Appl:IRII:bsm

YOUR REFERENCE

March 13, 1975

Ms. Caryl Privett
Adams, Baker & Clemon
Suite 1600, 2121 Building
2121 Eighth Avenue North
Birmingham, Alabama 35203

Dear Ms. Privett:

This is in further regard to the discrimination complaint of Mrs. Dorothy Holloway.

The hearing on the complaint has been rescheduled for Monday, April 7, 1975, beginning at 9:00 a.m. in the Second Floor Conference Room, Building 4202, Marshall Space Flight Center, Huntsville, Alabama.

With regard to your request that I order the agency to answer your interrogatories and to furnish you documents, such matters are beyond the scope of my authority under Part 713 of the Civil Service Commission Regulations. If you are unable to obtain the desired information from the agency, you may request such information at the hearing and, if relevance or materiality is established, the agency will be requested to furnish these documents and they will be entered into the record as exhibits.

Sincerely yours,

Samuel F. Vesser Jr.
SAMUEL F. VESSER, JR.
Assistant Appeals Officer

cc:
Mrs. Dorothy Holloway
3805 Eaton Road
Huntsville, Alabama 35811

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

NOV 21 1975

IN REPLY REFER TO

Mr. Eric Schnapper
NAACP Legal Defense and Educational Fund
10 Columbus Circle
New York, New York 10019

Dear Mr. Schnapper:

This is in response to your telephone call of November 20, requesting data on the number of individuals who received back pay from EEOC conciliation agreements and the cumulative dollar figure of this back pay.

In FY 1975, the number of persons benefitted was 51,216; the dollar figure was $109,669,285; and the number of successful conciliations was 5,983.

In FY 1974, the number of persons benefitted was 49,388; the dollar figure was $56,266,827; and the number of successful conciliations was 4,519.

I hope that this information is useful.

Sincerely yours,

Marty Rogers

Marty Rogers
Special Assistant to the
Executive Director